No. 13-15277

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HONOLULUTRAFFIC.COM, *et al.*,
Plaintiffs-Appellants,

v.

FEDERAL TRANSIT ADMINISTRATION, *et al.*,
Defendants-Appellees,

and

FAITH ACTION FOR COMMUNITY EQUITY, *et al.*,
Defendants-Intervenors-Appellees

On Appeal from the United States District Court for
the District of Hawaii, Case No. 11-00307 AWT

CITY DEFENDANTS-APPELLEES' BRIEF

NOSSAMAN LLP
ROBERT D. THORNTON (CA 72934)
rthornton@nossaman.com
Special Deputy Corporation Counsel
City and County of Honolulu
18101 Von Karman Avenue, Suite 1800
Irvine, CA 92612
Telephone: 949.833.7800
Facsimile: 949.833.7878

NOSSAMAN LLP
EDWARD V.A. KUSSY (DC 982417)
ekussy@nossaman.com
Special Deputy Corporation Counsel
City and County of Honolulu
1666 K. Street, NW, Suite 500
Washington, DC 20006
Telephone: 202.887.1400
Facsimile: 202.466.3215

CARLSMITH BALL LLP
JOHN P. MANAUT (HI 3989)
jpm@carlsmith.com
LINDSAY N. MCANEELEY (HI 8810)
lmcaneeley@carlsmith.com
Special Deputies Corporation Counsel
City and County of Honolulu
ASB Tower, Suite 2200
1001 Bishop Street
Honolulu, HI 96813
Telephone: 808.523.2500
Facsimile: 808.523.0842

DONNA Y. L. LEONG (HI 3226)
Corporation Counsel
dleong1@honolulu.gov
DON S. KITAOKA (HI 2967)
dkitaoka@honolulu.gov
Deputy Corporation Counsel
City and County of Honolulu
530 S. King Street, Room 110
Honolulu, HI 96813
Telephone: 808.768.5248/808.768.5100
Facsimile: 808.768.5105

Attorneys for Defendants-Appellees
THE CITY AND COUNTY OF HONOLULU and
MICHAEL FORMBY, in his official capacity as
Director of the City and County of Honolulu
Department of Transportation Services

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, City Defendants-Appellees hereby certify that none of them has a parent corporation and that none of them has issued stock of which 10% or more is owned by a publicly held corporation.

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ACRONYM AND ABBREVIATION LIST

Acronym or Abbreviation	Definition
AA	Alternatives Analysis
Alternatives Report	Honolulu High-Capacity Transit Corridor Project Alternatives Analysis Report
Advisory Council	Advisory Council on Historic Preservation
AIS	Archaeological Inventory Survey
APE	Area of Potential Effects
AR	Administrative Record
Br.	Appellants Opening Brief
BRT	Bus Rapid Transit
City	City and County of Honolulu
December Order	12/27/12 District Court Order "Judgment and Partial Injunction"
Draft EIS	Draft Environmental Impact Statement
Draft SEIS	Draft Supplemental Environmental Impact Statement
EIS	Environmental Impact Statement
ER	Excerpts of Record
Final EIS	Final Environmental Impact Statement

ACRONYM AND ABBREVIATION LIST

Acronym or Abbreviation	Definition
FHWA	Federal Highway Administration
FTA	Federal Transit Administration
HEPA	Hawai‘i Environmental Policy Act of 1974
HRS	Hawaii Revised Statutes
HonoluluTraffic	Plaintiffs-Appellants
Lead Agencies	Federal Transportation Administration and the City and County of Honolulu
MAP-21	Moving Ahead for Progress in the 21st Century Act
May Order	May 17, 2012 District Court memorandum opinion entitled, “Order on Defendants’ Motions for Partial Summary Judgment”
MLA	Managed Lane Alternative
National Register	National Register of Historic Places
National Trust	*Amicus Curiae* National Trust for Historic Preservation
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
NOI	Notice of Intent

ACRONYM AND ABBREVIATION LIST

Acronym or Abbreviation	Definition
November Order	November 1, 2012 District Court memorandum opinion, entitled "Order on Cross-Motions for Summary Judgment," (1ER0052-0096)
NPS	National Park Service
O'ahu MPO	O'ahu Metropolitan Planning Organization
OIBC	O'ahu Island Burial Council
ORTP	O'ahu Regional Transportation Plan 2030, as amended
PA	Programmatic Agreement
Project	Honolulu Rail Transit, formerly known as Honolulu High-Capacity Transit Corridor Project
ROD	Record of Decision
SAFETEA-LU	Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users
Section 106	16 U.S.C. § 470
Section 4(f) or 4(f)	49 U.S.C. § 303
Section 4(f) Property	Land from publicly owned parks, recreational areas, wildlife and waterfowl refuges, or public and eligible historical sites
SER	Supplemental Excerpts of Record

ACRONYM AND ABBREVIATION LIST

Acronym or Abbreviation	Definition
SHPD	Hawai‘i State Historic Preservation Division
SHPO	Hawai‘i State Historic Preservation Officer
TCPs	Traditional Cultural Properties
TOP 2025	Transportation for O‘ahu Plan
Transportation Systems Management	Improvements to existing transportation system without major capitol investments
2003 EIS	Primary Corridor Transportation Project Final Environmental Impact Statement
2030 ORTP	2030 O‘ahu Regional Transportation Plan

INTRODUCTION

Plaintiffs-Appellants HonoluluTraffic.com et al. ("HonoluluTraffic") challenge the Federal Transit Administration's ("FTA") approval of the Honolulu Rail Project ("Project"). The Project is needed to address the extraordinary traffic congestion in the project corridor (between west O'ahu and downtown Honolulu), and provide an equitable alternative to the private automobile for transit dependent communities. It implements O'ahu's smart growth land use policies that protect outlying and rural areas by focusing new development in the already urbanized Project corridor (shown below).

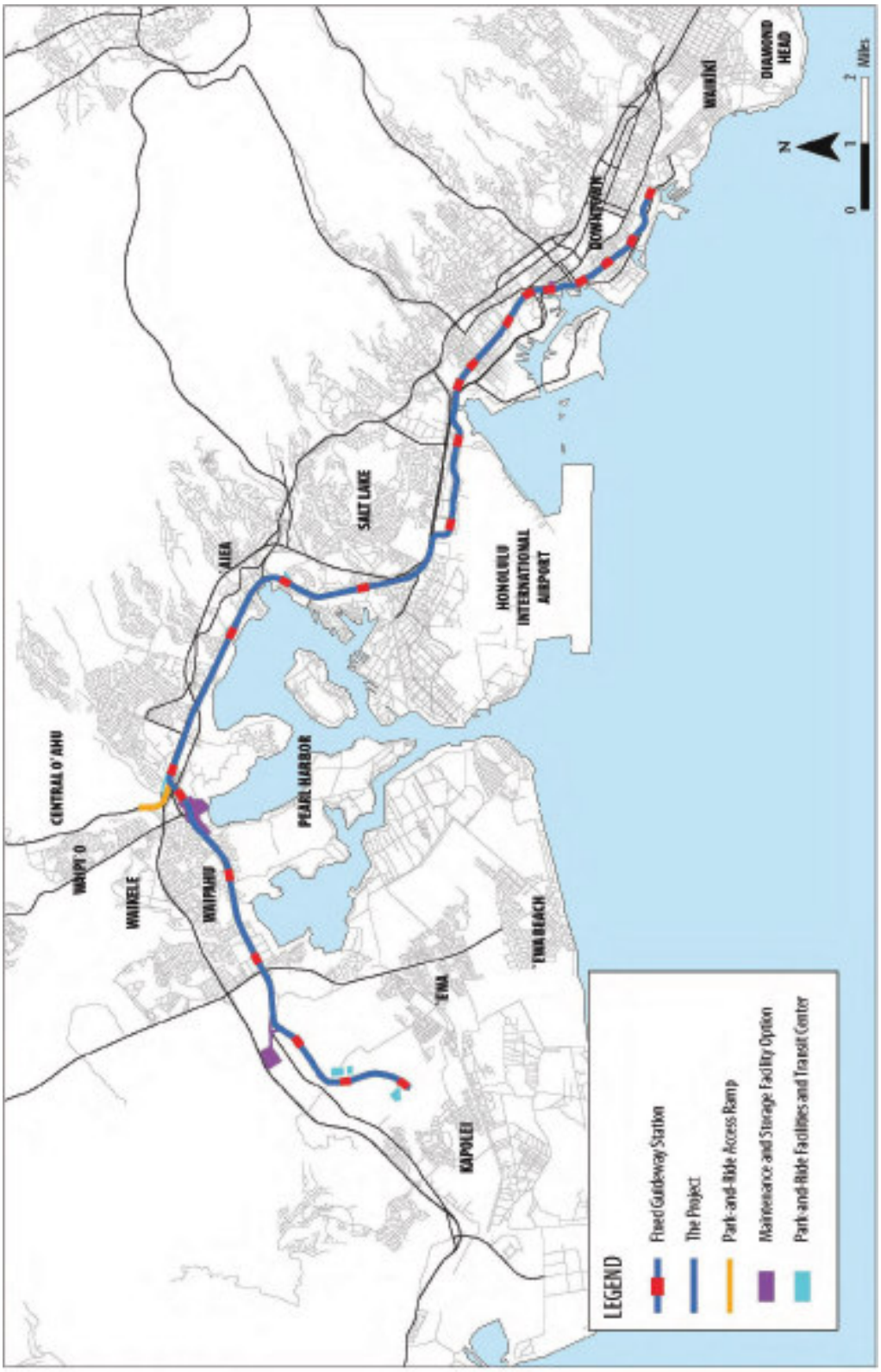


Figure 2-6 Airport Alternative

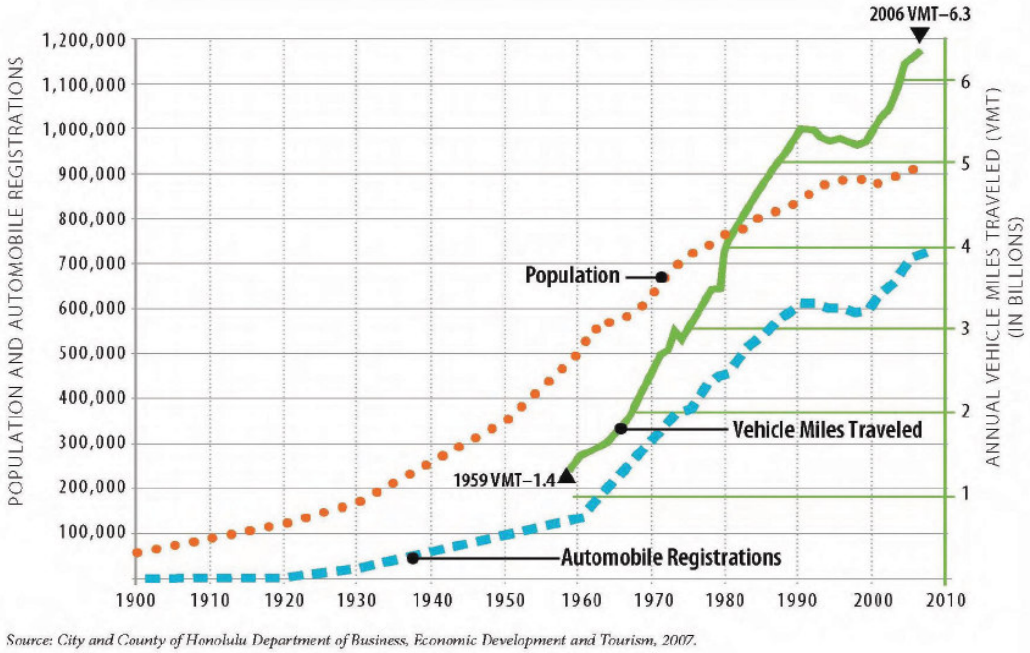
3ER0568

The Project corridor contains over 60% of O‘ahu’s population and 80% of O‘ahu’s jobs. 3ER0530[1]. Upon completion, people living, working, and traveling in the corridor will have fast, reliable transportation to areas now dependent on private automobiles. Transit access to key employment centers such as downtown Honolulu, Pearl Harbor Naval Base, and Honolulu International Airport will vastly improve.

As the figure below demonstrates, O‘ahu’s population has increased dramatically in the last five decades, but the vehicle miles traveled over the same period (indicated by the green line) have increased even more. The reason is clear. Honolulu, Hawai‘i’s largest city, depends primarily on the private automobile for transportation. As a result, Honolulu suffers from the second worst traffic congestion in the nation. *See* INRIX. Inc., *INRIX Traffic Scorecard, http://scorecard.inrix.com/scorecard/* (last visited June 9, 2013).

[1] Citations to the Excepts of Record (“ER”) and Supplemental Excerpts of Record (“SER”) consist of the volume number, ER or SER, and page number.

Figure 1-1 Honolulu High-Capacity Transit Corridor Project Vicinity



Source: City and County of Honolulu Department of Business, Economic Development and Tourism, 2007.

Figure 1-2 Population, Vehicle Ownership, and Vehicle Miles Traveled Trends for O`ahu

1-2 | CHAPTER 1 – Background, Purpose and Need

3ER0526.

Honolulu's reliance on automobiles has caused a dramatic decline in mobility, increased the cost of goods and services, and imposed a burden on the economy. It also encourages longer commutes and lower density development in outlying areas, contrary to the City and County of Honolulu's ("City") smart growth land use policies.

The Project reflects a considered policy choice by Hawai'i's citizens and elected officials based on a robust and open debate over several decades. Honolulu

Mayor Kirk Caldwell, along with the Governor and all members of the Hawai‘i Congressional delegation, support the Project. The Hawai‘i Legislature and the Honolulu City Council approved tax measures to fund the Project. Honolulu's voters approved the Project in two referenda. HonoluluTraffic disagrees with these policy choices and political decisions. Appellant Benjamin Cayetano, is a former Governor who unsuccessfully ran for Mayor of Honolulu in 2012 on a platform centered on his opposition to the Project. This was his right in our democratic system. It is not the role of the courts, however, to resolve the policy dispute underlying HonoluluTraffic's lawsuit. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1994) ("*Chevron*").

Having failed in its opposition to the Project in all electoral, legislative and administrative forums, HonoluluTraffic now asks this Court to second-guess technical, fact-bound, determinations made by FTA after extensive consultation with, and concurrence by, the relevant state and federal agencies.

The burden is on HonoluluTraffic to demonstrate on the basis of the **record as a whole** that FTA acted arbitrarily and capriciously in approving the Project. 5 U.S.C. § 706(2)(A). Since HonoluluTraffic cannot satisfy this burden based on the **whole record**, is resorts to mischaracterizations of selected portions of the voluminous record. An objective review of the whole record demonstrates that FTA and the City rigorously followed the procedures required by federal law.

STATEMENT OF JURISDICTION

The District Court had, and continues to have, jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1361. Because the District Court has not issued a "final decision", this Court does not have jurisdiction under 28 U.S.C. § 1291. *See Alsea Valley Alliance v. Dep't of Commerce*, 358 F.3d 1181, 1184 (9th Cir. 2003) ("*Alsea*"). See ARGUMENT, Section I below.

STATEMENT OF ISSUES PRESENTED

The City incorporates the Statement of Issues in FTA's brief.

STATEMENT OF FACTS/STATEMENT OF THE CASE

I. Project Description

The Project is a 20-mile elevated fixed guideway rail transit project. 3ER0594. It includes 21 stations and will connect Kapolei, on the west side of Oʻahu, with Ala Moana Center on the east side of downtown Honolulu. *See* 2ER0254; 3ER0485, 0572. The Project provides transit access to major employment centers, activity centers, and tourist destinations, including the Pearl Harbor Naval Base, the Honolulu International Airport, Chinatown, the downtown business district, the Civic Center, and the Ala Moana Center. 3ER0573-0576.

With the exception of the Kapolei end of the Project, the Project alignment is located within already urbanized areas, where most of the Project support columns will be installed within already developed roadways. 3ER0576. The Project crosses the boundaries of the Chinatown Historic District within the

median of the six-lane Nimitz Highway, but does not physically impact any historic structures. 4ER0951-0954. The following are photos of the Project location within the Chinatown Historic District:

24SER05972

24SER05988.

The Project will operate in an exclusive elevated guideway to ensure system speed and reliability, and to avoid conflicts with automobile and pedestrian traffic. 3ER0577. The trains will be steel-wheel-on-steel-rail, electrically powered from a third-rail system. 3ER0578. The trains are capable of speeds greater than fifty miles per hour and will provide a fast alternative to the use of private automobiles and buses on highly congested streets and highways. *Id*.

Construction will be completed in four phases. Phase 1 is on the west end of the Project, and Phase 4 is in downtown Honolulu. Construction work in the first

and second phases began in 2012. Construction is scheduled to be completed by 2018. 3ER0595.

II. Project History

A. The Multi-Decade Evaluation of Transportation Alternatives

The Project is the result of decades of environmental, economic, and engineering study, including the analysis of many alternative solutions to the area's mobility challenges. 3ER0525-0529. The Project reflects years of consultation and coordination with the Hawai'i State Historic Preservation Officer ("SHPO"),[2] the federal Advisory Council on Historic Preservation ("Advisory Council"),[3] the O'ahu Island Burial Council ("OIBC"), the National Park Service ("NPS"), native Hawaiian organizations, historic preservation advocates, environmental organizations, and many other interested parties. 4ER1016-1017; 3SER00547. The SHPO and the Advisory Council issued approvals of the Project.

The public, through its elected representatives and direct votes, repeatedly supported the Project. In 2005, the Hawai'i State Legislature authorized the City to levy a general excise and use tax surcharge, and the City adopted the tax

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[2] The SHPO administers the State of Hawai'i's historic preservation program. 36 C.F.R. § 800.16(v); Haw. Rev. Stat. ("HRS") § 6E-5.

[3] The Advisory Council is the federal agency with the responsibility to oversee and provide guidance and advice to other federal agencies concerning implementation of the National Historic Preservation Act. *See* 36 C.F.R. § 800.2(b).

surcharge. *See* HRS § 46-16.8. 20SER05118. Honolulu's voters approved a City Charter amendment endorsing the Project. 20SER05119.

Planning for a fixed guideway transit project began in the 1960's, with the preparation of the 1967 O'ahu Transportation Study, and continued in the 1970's with the preparation of preliminary engineering studies for a fixed guideway rapid transit system. 3ER0527; 14SER03404; 20SER05074. In 1998, after extensive public involvement, the City developed a mobility concept plan which identified the need for highway and transit improvements.

In 2003, the City and FTA issued the "Primary Corridor Transportation Project Final Environmental Impact Statement" ("2003 EIS"). The first segment of the Primary Corridor Transportation Project (5SER01091), consisted of a Regional Bus Rapid Transit ("BRT") mainly operating in mixed traffic lanes. 5SER01100;[4] *see also* 5SER01093-01094; 5SER01124-01126.

In 2004, the O'ahu Metropolitan Planning Organization[5] ("O'ahu MPO") updated the Regional Transportation Plan ("2030 ORTP") – the mandatory federal-state transportation plan that integrates federal transportation policies and state and

[4] As HonoluluTraffic acknowledges, lead plaintiff here, Cliff Slater, was also the lead plaintiff in litigation challenging the BRT. Br. 13 n.6.

[5] The O'ahu MPO includes City and State elected officials and the Directors of the Hawai'i Department of Transportation and the City Department of Transportation Services. 19SER04667.

local land use policies. 49 U.S.C. §§ 5303-5304; 3ER0527. The 2030 ORTP vision focused on increasing mobility options. Strategies to address the island's future transportation needs included major capital investment projects that add to the system's person-carrying capacity and minimize reliance on cars. 13SER03383.

The O'ahu MPO evaluated regional transportation alternatives for the region that were consistent with local land use plans. 13SER03381, 03384. Honolulu's adopted General Plan seeks to minimize the environmental impacts of population growth by focusing new housing and commercial development in existing developed areas along the Interstate H-1 Corridor. 13SER03388. The General Plan thereby seeks to restrict growth in less developed and rural areas north and east of urban Honolulu. *Id.* The 2030 ORTP concluded that a high-capacity, high-speed transit project connecting west O'ahu with downtown Honolulu was necessary to implement O'ahu's land use policies. 13SER03384.

The 2030 ORTP evaluated a range of alternative transportation improvements, including a fixed guideway system in various corridors and alternatives to a fixed guideway system. 3ER0528. After extensive public involvement, the O'ahu MPO approved the 2030 ORTP, including as a "key component a fixed guideway that will serve the H-1 travel corridor." *Id.*; *see also* 19SER04642; 13SER03384 (Amended ORTP). The Amended ORTP states that the "proposed fixed guideway from East Kapolei to Ala Moana will become the

backbone of the transit system – connecting major employment and residential centers to each other and to downtown Honolulu." 13SER03384.

B. FTA Initiation of the NEPA Process; Alternatives Analysis

In December 2005, FTA and the City (collectively, "Lead Agencies") published a Notice of Intent ("NOI") to prepare an EIS and Alternatives Analysis ("AA") for the implementation of transit improvements that potentially included high-capacity transit service in a 25-mile travel corridor between Kapolei and Waikiki. 11ER2887. Federal law required the preparation of an AA for federally-funded transit projects. The AA process was the first step of the NEPA process for major transit projects.[6] 49 U.S.C. §§ 5309(a)(1), 5309(e)(3); *see also* FTA, *Linking the Transportation Planning and National Environmental Policy Act (NEPA) Processes* (23 C.F.R. pt. 450, Appendix A, Question 12) ("Part 450 Appendix").

The NOI asked the public to comment on the proposed alternatives, the Project's purpose and need, and the range of issues in a series of scoping meetings. 11ER2887; 4SER00984. The information obtained through scoping led to the

[6] Section 6002 of The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU"), Pub. L. No. 109-59, 119 Stat. 1144 (Aug. 10, 2005), (codified as 23 U.S.C. § 139), was the governing law during Project development and NEPA review. Congress amended it in Moving Ahead for Progress in the 21st Century Act ("MAP-21"). (Pub. L. No. 112-141, 126 Stat. 405 (July 6, 2012). Citations refer to the pre-amendment versions of these provisions, as set forth in the Addendum.

preparation of the AA. Specifically, in response to comments by HonoluluTraffic.com, an additional operational variation was added to the "managed lane alternative" for consideration during the AA. 3SER00548-00549; 11ER2746-2754.

The AA evaluated four alternatives to address the need for improved transportation in the study corridor: (1) no build; (2) improvements to the existing transportation system, including expanded bus service ("Transportation Systems Management" or "TSM"); (3) managed lane alternatives ("MLA") (express buses operating in dedicated lanes with tolls charged to single occupant vehicles), and (4) a fixed guideway transit system. 9ER2377.

On November 1, 2006, the City issued the "Honolulu High-Capacity Transit Corridor Project Alternatives Analysis Report" ("Alternatives Report"). 9ER2367. After reviewing the Alternatives Report and 3,000 public comments, the City Council selected the Fixed Guideway Transit System Alternative as the "Locally Preferred Alternative." 3ER0529; 9ER2318.

Enhanced bus service, similar to the BRT system, was evaluated during the AA phase through the TSM Alternative. 2SER00495; 11ER2745 (TSM Alternative included enhanced bus system and improvements on selected roadways to provide priority to buses). Under the TSM Alternative, the a.m. peak-hour-only zipper lane would have been modified to operate in both the a.m. and p.m. peak

periods, as was proposed in the 2003 EIS for BRT. 2SER00495; 5SER01116, 01120 (description of Regional BRT element of BRT system in 2003 EIS).

The TSM Alternative was eliminated from further evaluation because it did not provide high-capacity service and, when operating in mixed traffic, could not provide predictable travel times. 3ER0529; 11ER2779. Because the TSM Alternative would operate in mixed traffic, it would have done little to improve corridor mobility and travel reliability. TSM also did not support the goals of concentrating growth within the corridor and reducing development pressure in rural areas. 3ER0557; 2SER00495-00496 ("[B]ecause of the dispersed nature of the transit service, slow bus speeds, and unreliable service, the TSM Alternative would not have supported the City's goals of concentrating growth within the corridor and reducing development pressures in rural areas.").

C. The Scoping Process, Circulation of Draft EIS, and Evaluation of Alignment Alternatives

In 2007, after preparation of the AA, the Lead Agencies issued a second "[NOI] to Prepare an Environmental Impact Statement" and invited comment on the purpose and need for a fixed guideway transit system. 9ER2314. The alternatives included the modes to be evaluated, the alignments, and termination points. 9ER2314-2317. The NOI defined the No Build Alternative, described two Build Alternatives, requested comments on five transit options, and provided that other reasonable alternatives, consistent with the Project's purpose and need, could be added to the Draft Environmental Impact Statement ("Draft EIS"). 9ER2314-

2317. A third alignment alternative, serving the Airport without following Salt Lake Boulevard, was identified during the scoping process. 12SER02793-02795. The Lead Agencies responded to the comments submitted during the scoping process. *Id.*

The Lead Agencies issued the Draft EIS for the Project in November 2008. 12SER02793, 4SER00989. On November 21, 2008, a notice of availability of the Draft EIS and of a 45-day comment period was published. 4SER00986; 73 Fed. Reg. 70639 (Nov. 21, 2008). FTA subsequently extended the public comment period to February 6, 2009. 73 Fed. Reg. 77687 (Dec. 19, 2008).

In addition to the alternatives evaluated in the AA, the Draft EIS evaluated the No Build Alternative and three alternative project alignments. 3ER0554-0564, 0570. The Draft EIS also incorporated the AA by reference, making the AA part of the Draft EIS. 40 C.F.R. § 1502.21; *see also* 3SER00611-00618.

The Draft EIS identified ten publicly-owned parks and recreation sites adjacent to the Project that were subject to evaluation under 49 U.S.C. § 303 ("Section 4(f)"). The Draft EIS also evaluated eighty-four historic resources under Section 4(f) and Section 106 of the National Historic Preservation Act ("Section 106") within the Project's "Area of Potential Effects" ("APE"). 3SER00885-00891.

D. Significant Public Involvement in the Project

The Lead Agencies provided extensive opportunities for public comment and involvement during the evaluation of the Project alternatives. 4ER0101. The Lead Agencies conducted five noticed public hearings on the Draft EIS in December 2008, and hundreds of informal meetings and public presentations. 4ER1014-1022. Over the course of the five-year NEPA process, the Lead Agencies considered more than 3,000 separate comments in over 600 letters or e-mails. 4ER1014, 1022. The overwhelming majority of comments supported for the Project.

III. Inter-Agency Coordination and the Section 4(f) and National Historic Preservation Act Consultation Process

The Lead Agencies committed much of the five-year NEPA, Section 4(f), and National Historic Preservation Act ("NHPA") process to consultation and coordination with the many local, state, and federal agencies with interest in the Project. The Lead Agencies consulted with twenty-six state and federal agencies, including the SHPO, Advisory Council, Historic Hawai‘i Foundation, and the OIBC. 4ER1016-1017; 3SER00547.

The City conducted several studies of archaeological and cultural resources along the **entire length** of the Project corridor. The studies are described in the "Honolulu High-Capacity Transit Corridor Project Alternatives Analysis Archaeological Technical Report" ("Technical Report"). 8ER2084-2087. The extensive archaeological studies documented in the Technical Report included:

- A comprehensive literature search;
- Consultations with cultural and ethnic experts;
- Archaeological research within the study corridor that has been conducted and compiled for various private, municipal, state, and federally funded projects; and
- A comprehensive above-ground investigation conducted along the entire length of the Project to identify any evidence of previously-unknown historic and cultural resources.

4ER0852; 8ER2051-2257.

IV. Publication of Final Environmental Impact Statement

In June 2010, the Lead Agencies published a notice of availability of the Final EIS. 4SER00988; 75 Fed. Reg. 36386 (June 25, 2010). The Final EIS included a revised evaluation of the impacts of the Project on Section 4(f) resources. 4ER0913-0985. It documents the extensive consultation by the Lead Agencies with regard to potential impacts to Section 4(f) resources. 4ER1016-1018, 2ER0247-0260.

V. Issuance of Record of Decision and Programmatic Agreement

FTA approved the Project and issued the Record of Decision ("ROD") on January 18, 2011. 2ER0247. The Lead Agencies, the Advisory Council, the SHPO, and the U.S. Navy entered into the Programmatic Agreement (regarding

protection of historic resources), and FTA incorporated the Programmatic Agreement into its ROD. 2ER0247-0260; 2ER0300-0445.

VI. The District Court's Rulings

On May 17, 2012, the District Court issued its "Order on Defendants' Motions for Partial Summary Judgment," granting in part and denying in part a motion for partial summary judgment filed by City Appellees (the "May Order"). 1SER00146. The May Order held that HonoluluTraffic lacked standing and/or waived its right to pursue a number of Section 4(f) claims.[7] 1SER00149-00152; 00156-00158.

On November 1, 2012, the District Court issued its "Order on Cross-Motions for Summary Judgment," granting in part and denying in part cross-motions for summary judgment on HonoluluTraffic's remaining claims (the "November Order"). 1ER0052-0096. The District Court ruled in favor of HonoluluTraffic on three claims arising under Section 4(f), and in favor of Defendants on all other claims. 1ER0053.

After additional briefing and argument on remedies, the District Court issued the December Order, remanding the matter to FTA for additional studies and analyses and enjoining construction and real estate acquisition activities in Phase 4

[7] As HonoluluTraffic did not raise these claims in their Opening Brief, they are waived, notwithstanding *Amicus Curiae* National Trust's attempt to revive them.

of the Project. 1ER0001-0003. With respect to the additional studies and analyses, Defendants must: (1) "complete their identification of above ground [Traditional Cultural properties ("TCPs")] within the corridor," (2) "reconsider their no-use determination" for Mother Waldron Park," and (3) "fully consider the prudence and feasibility of the Beretania tunnel alternative specifically." 1ER0063, 0071-0072, 0078. Depending upon the outcome of these additional studies, Defendants may also be required either to supplement the Final EIS and ROD, or to withdraw the Final EIS and ROD and reconsider the Project. 1ER0063, 0071-0072, 0078.

The December Order also provides that the injunction "shall terminate 30 days after [FTA] files with the court a notice of compliance with the [November Order] and evidence of such compliance, unless [HonoluluTraffic] file[s] objections within said 30-day period." 1ER0003.

STANDARD OF REVIEW

The City incorporates FTA's discussion of the standard of review.

SUMMARY OF ARGUMENT

1. This Court lacks jurisdiction under 28 U.S.C. § 1292(a)(1) because HonoluluTraffic's Opening Brief failed to include any substantive argument challenging the scope of the injunction in the December Order, thereby waiving any such challenge. This Court also lacks jurisdiction under 28 U.S.C. § 1291 because the December Order is not a "final decision." The December Order

includes a partial remand and return process that does not (1) conclusively resolve a separable legal issue, (2) force the agency to apply a potentially erroneous rule which may result in a wasted proceeding, and (3) foreclose review if an immediate appeal were unavailable.

2. The Project purpose and need complied with NEPA. The purpose and need reflects the statutory context of the approval of new transit projects. The Lead Agencies developed the purpose and need through a NEPA - compliant process mandated by statute - one, that provided numerous opportunities for public participation and comment.

3. FTA evaluated a reasonable range of alternatives. The alternatives evaluated in detail in the Final EIS met the Project's purpose and need and were selected through a well-documented process with extensive public participation.

4. The Final EIS fulfilled the requirements of NEPA to "briefly discuss" the MLA and light rail alternative. After studying MLA for several years, the Lead Agencies reasonably determined that it would not achieve Project purpose and need, would not result in substantially fewer environmental impacts, and would not be financially feasible.

Two configurations of light rail – throughout the Project corridor and in the downtown area – were considered and did not meet purpose and need. They failed to provide high-capacity rapid transit and failed to ensure mobility and reliability.

5. The Lead Agencies determined, and the record supports the finding, that the MLA and BRT alternatives did not meet the purpose and need of the Project and were therefore imprudent under Section 4(f). Thus, the Lead Agencies were not required to consider these alternatives further under Section 4(f).

6. The Lead Agencies did not improperly defer evaluation of unknown Native Hawaiian burials in violation of Section 4(f). The record demonstrates that the Lead Agencies conducted a detailed evaluation to identify all archaeological resources along the entire Project corridor, and committed to avoid the "use" of any Section 4(f) eligible burials.

ARGUMENT

I. JURISDICTIONAL ARGUMENT

The City previously moved to dismiss this appeal for lack of jurisdiction. City Defs.-Appellees' Mot. to Dismiss Appeal, ECF No. 8-1. The motion was denied "without prejudice to renewing the arguments in the answering brief." Order 1, May 3, 2013, ECF No. 22.

A. This Court Lacks Jurisdiction Under 28 U.S.C. § 1292(a)(1)

Renewal of the jurisdictional argument is particularly appropriate in this case, as the facts have changed. HonoluluTraffic's opposition to the prior motion asserted that the Court would have jurisdiction under 28 U.S.C. § 1292(a)(1), which establishes jurisdiction over district court orders granting or refusing injunctions. Pls.-Appellants' Opp. to Mot. to Dismiss 19-20, ECF No. 11-7.

However, HonoluluTraffic's Opening Brief makes no arguments challenging the injunction and they have, therefore, waived jurisdiction under 28 U.S.C. § 1292(a)(1).[8]

"On appeal, arguments not raised by a party in its opening brief are deemed waived." *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999); *Autotel v. Nev. Bell Tel. Co.*, 697 F.3d 846, 857 n.9 (9th Cir. 2013) ("conclusory statement in its opening brief, unaccompanied by argument or citation to the record, is insufficient to preserve the issue for appeal"). HonoluluTraffic's Opening Brief fails to include any substantive argument challenging the scope of the injunction in the December Order.

B. This Court Lacks Jurisdiction Under 28 U.S.C. § 1291

The jurisdictional argument is now limited to the single issue of the applicability of 28 U.S.C. § 1291, which provides jurisdiction over "final decisions of the district courts." Because the December Order's partial remand is not a "final decision," this Court lacks jurisdiction.

When, as here, a remand order is not challenged by an administrative agency, controlling precedent requires the application of a three-factor test to determine if the order is "final" for purposes of appeal. *See, e.g., Williamson v.*

[8] HonoluluTraffic has also waived any issues from the District Court's May Order or November Order to the extent they did not specifically raise them in their Opening Brief.

UNUM Life Ins. Co., 160 F.3d 1247, 1251 (9th Cir. 1998) ("*Williamson*") (quoting *Chugach Alaska Corp. v. Lujan*, 915 F.2d 454, 457 (9th Cir. 1990) ("*Chugach*")). If the order fails to satisfy just one of these factors, the decision will not be considered "final." *See Williamson*, 160 F.3d at 1251 (remand appealable "only when" all three factors satisfied); *Chugach*, 915 F.2d at 457; *Alsea*, 358 F.3d at 1184 (remand order not "final" because single factor not satisfied); *Rendleman v. Shalala*, 21 F.3d 957, 959 (9th Cir. 1994) ("order remanding case to Secretary is final where three criteria met"); *Shapiro v. Paradise Valley Unified Sch. Dist. No. 69*, 152 F.3d 1159, 1161 (9th Cir. 1998) ("*Shapiro*").[9] This test applies regardless of the label employed by the district court, because the substance of the order is controlling. *Sullivan v. Finkelstein*, 496 U.S. 617, 628 n.7 (1990) (label "cannot control the order's appealability"); *Eluska v. Andrus*, 587 F.2d 996, 997 (9th Cir. 1978) (decision labeled "judgment" not a "final decision").

A partial remand order will be considered "final" only if: "(1) the order conclusively resolved a separable legal issue, (2) the remand order forces the agency to apply a potentially erroneous rule which may result in a wasted

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[9] In *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161 (9th Cir. 2011), a per curiam decision, the Court stated that the three factors "are considerations, rather than strict prerequisites." *Id.* at 1175. Because there has been no intervening en banc or Supreme Court authority overruling *Williamson*, *Chugach*, and *Shapiro*, the passing statement in *Sierra Forest Legacy* is of no precedential value. *See, e.g., U.S. v. Ramos-Medina*, 706 F.3d 932, 938-39 (9th Cir. 2011); *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc).

proceeding, and (3) review would, as a practical matter, be foreclosed if an immediate appeal were unavailable." *Williamson*, 160 F.3d at 1251 (internal quotations omitted) (quoting *Chugach*, 915 F.2d at 457). In this case, the partial remand will not force the agency to apply a potentially erroneous rule, thereby resulting in a wasted proceeding. Nor will it foreclose review. Thus, the District Court's order is not a "final decision."

HonoluluTraffic cannot credibly argue that the reconsideration required by the District Court will require the Appellees to apply a potentially erroneous rule.[10] During the District Court proceedings HonoluluTraffic argued that the law mandates that the three issues must be accompanied by studies and analyses. 1ER0062, 0070, 0075. The governing regulations guarantee public participation in this process. 23 C.F.R. §§ 771.130(d), 771.123(g) (requiring drafts to be made available to the public for comment). The District Court-required process is substantive and demanding, not a "waste of time":

(1) If TCPs are identified and adversely affected by the Project, Defendants must conduct a complete Section 4(f) analysis. They must also supplement the ROD and Final EIS, if changes "may result in significant

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[10] In *Williamson*, the Court expressly held that a remand order must "require the application of a new or erroneous standard . . . to render the order appealable." 160 F.3d at 1251. In *Sierra Forest Legacy,* the Court ignored this binding precedent. 646 F.3d at 1176. *Sierra Forest Legacy* is in direct contravention of controlling Ninth Circuit precedent and is not binding. *See, e.g., U.S. v. Ramos-Medina*, 706 F.3d at 938-39; *Miller v. Gammie*, 335 F.3d at 900.

environmental impacts in a manner not previously evaluated and considered." 1ER0063.

(2) Defendants must also "fully consider the prudence and feasibility of the Beretania Street Tunnel Alternative, and supplement the Final EIS and ROD to reflect this analysis. If Defendants determine that their previous decision to exclude the Beretania alternative as imprudent was incorrect, they must withdraw the Final EIS and ROD and reconsider the project. 1ER0078.

(3) Defendants are ordered to "reconsider their no-use determination" for Mother Waldron Park. If they conclude that the Project will "constructively use" Mother Waldron Park, they must seek prudent and feasible alternatives, or otherwise mitigate any adverse impact, supplement the ROD, and supplement the Final EIS to the extent that this process affects its analysis or conclusions. 1ER0071-0072.

On May 30, 2013, FTA circulated a draft Supplemental Environmental Impact Statement/Section 4(f) Evaluation ("Draft SEIS") for public review.[11] 78 Fed. Reg. 34377 (June 7, 2013); 23 C.F.R. § 771.123(g).

After circulation, FTA must consider the comments received and prepare a final SEIS that "discuss[es] substantive comments received on the draft EIS and

[11] The Court may consider the Draft SEIS because jurisdictional arguments are not limited to the record. *E.g., In re Cellular 101, Inc. v. Channel Comm'ns, Inc.*, 539 F.3d 1150, 1156 (9th Cir. 2008).

responses thereto, summarize[s] public involvement, and describe[s] the mitigation measures that are to be incorporated into the proposed action." 23 C.F.R. § 771.125(a). FTA retains the ultimate discretion to approve or not approve the studies and analyses. Significant substantive steps must be completed before changes to the Project can be ruled out.

The December Order is not a "final" appealable decision because denying "an immediate appeal does not, as a practical matter, foreclose review." *Alsea*, 358 F.3d at 1184. The December Order grants HonoluluTraffic the right to file an objection to any finding of compliance, and the injunction remains in effect pending resolution of the objection. 1ER0003.

HonoluluTraffic, of course, may challenge FTA's determinations in the District Court and in this Court. The history of HonoluluTraffic's opposition to the Project makes it highly likely that they will do so.

II. FTA COMPLIED WITH NEPA

HonoluluTraffic's NEPA arguments all relate to the reasonableness of the Final EIS's range of alternatives. HonoluluTraffic purports to address the reasonableness of the Project's purpose and need as a separate argument, but it is not. EIS alternatives are not created in a vacuum; they respond to the underlying purpose and need. 40 C.F.R. § 1502.13.

A. The Definition of Purpose and Need Complies With NEPA and Ensures Consideration of Reasonable Alternatives

1. Standard of Review

A project's purpose and need briefly defines "the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13. While an agency cannot define its objectives in "unreasonably" narrow terms (*City of Carmel-by-the-Sea v. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1975)), "[c]ourts have 'afforded agencies considerable discretion to define the purpose and need of a project.'" *Westlands Water Dist. v. U.S. Dep't of the Interior*, 376 F.3d 853, 866 (9th Cir. 2004) ("*Westlands*") (citing *City of Angoon v. Hodel*, 803 F.2d 1016 (9th Cir. 1986) ("*Angoon*")). Preparing an EIS "necessarily calls for judgment, and that judgment is the agency's." *Lathan v. Brinegar*, 506 F.2d 677, 693 (9th Cir. 1974). As a result, courts "review the purpose and need, along with the choice of alternatives, under a 'reasonableness standard' or 'rule of reason.'" *League of Wilderness Defenders v. U.S. Forest Service*, 689 F.3d 1060, 1069 (9th Cir. 2012) ("*League of Wilderness*"); *see also Alaska Survival v. Surface Transp. Bd.*, 705 F.3d at 1084 (9th Cir. 2013) ("Courts review purpose and need for reasonableness giving the agency considerable discretion to define a project's purpose and need").

2. The Purpose and Need Statement Complies With NEPA

The Final EIS defines the Project's "purpose" as "to provide **high capacity** rapid transit in the highly congested east-west transportation corridor between

Kapolei and UH Mānoa, **as specified in the ORTP** (Oʻahu Metropolitan Planning Organization 2007)." 3ER0545 (emphasis added). The "need" is to improve corridor mobility and travel reliability, to improve access to planned development to support City policy to focus transit investments and new development in the H-1 corridor, and to improve transportation equity. *Id.*

This statement complies with Congress' intent expressed in the 2005 federal transportation authorization legislation ("SAFETEA-LU"). Congress specified that purpose and need may include "achieving a transportation objective identified in an applicable . . . metropolitan transportation plan" and "supporting land use, economic development, or growth objectives" in applicable local plans. 23 U.S.C. § 139(f)(3)(A)-(B). The ORTP is the applicable "metropolitan transportation plan," and the Project's purpose is to implement its transportation goals. The Project "supports land use" by helping to implement the City's General Plan, which calls for almost 50 percent of the growth projected for the entire island to occur in the ʻEwa Development Plan area. 3ER0530, 0546; 9ER2314-3216. The Project supports the Plan because it ensures that this area will be accessible to downtown and other parts of Oʻahu. 3ER0545.

The court must assess the reasonableness of this purpose and need in light of the statutory context of the federal action at issue. *League of Wilderness*, 689 F.3d at 1070. "[T]he agency has discretion to determine the best way to implement its statutory objectives, *see W. Watersheds Project v. Abbey*, No. 11-35705, 2013 WL

2532617, at *8 (9th Cir. June 7, 2013) ("*W. Watersheds*") (Bureau of Land Management did not violate NEPA by excluding changes to grazing practices from scope and purpose of purposed plan because the plan was developed to implement objectives of Executive Order); *Westlands*, 376 F.3d at 867, in light of the goals stated by the applicant[.]" *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1084; s*ee also Citizens Against Burlington Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991). "Statutory objectives provide a sensible compromise between unduly narrow objectives an agency might choose to limit consideration of alternatives and hopelessly broad societal objectives that would unduly expand the range of relevant alternatives." *N.Y.C. v. U.S. Dep't of Transp.*, 715 F.2d 732, 743 (2d Cir. 1983).

Each component of the Project's purpose and need implements elements of the federal law governing new transit projects. First and foremost, the project **must** be "part of an approved transportation plan and program of projects" (49 U.S.C. § 5309(c)(1)(A)), which is reflected by the "purpose" of providing transit "as specified by the ORTP."

The "need" for transportation equity ensures that the mobility of low-income and minority residents is not unduly burdened by congestion and the high cost of automobile operation. *Id.* This need directly reflects the statutory goal "to provide financial assistance to . . . help carry out national goals related to mobility for . . . economically disadvantaged individuals." 49 U.S.C. § 5301(f)(4); *see also* 49

U.S.C. § 5301(b)(5) (relates affordable public transportation to the welfare of lower income individuals).

Statutory goals also governed the process of defining purpose and need. This process began in 2005, when the planning process for the next regional transportation plan[12] was underway. The Final EIS explains:

> As part of its work to update the Regional Transportation Plan to *the O'ahu Regional Transportation Plan 2030* (ORTP), the O'ahu Metropolitan Planning Organization (O'ahu MPO) surveyed O'ahu residents about transportation issues in 2004. **The survey results identified traffic congestion during the commute period in the study corridor extending from 'Ewa and Central O'ahu to Downtown Honolulu as the biggest concern. By nearly a two-to-one margin, residents responded that improving transit was more important than building more roadways. Seventy percent of the respondents believed that rail rapid transit should be constructed** as a long-term transportation solution, and 55 percent supported raising taxes to provide local funding for the system.

3ER0527 (emphasis added).

This public process, as detailed in Section II of the Statement of the Case

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[12] The regional transportation plan in effect in 2005 was the"Transportation for O'ahu Plan," or "TOP 2025." As explained in TOP 2025,

> [T]he O'ahu Metropolitan Planning Organization (OMPO) is responsible for carrying out the various requirements of the metropolitan transportation planning process [required by federal law including] . . . that each major urban area develops a multi-modal long-range plan that documents ground transportation projects selected for federal funding for a minimum time horizon of 20 years.

19SER04545.

("Project History"), provided the Lead Agencies with guidance about community needs. As required by the governing statute, these community needs translated into the purpose and need. Courts have consistently deferred to the expertise and discretion of the lead agency in focusing the statutory mandates to meet local conditions. *See Westlands*, 376 F.3d at 867 (EIS team's discretion upheld in limiting the range of measures considered in an EIS). The purpose and need complies with NEPA.

B. FTA Considered a Reasonable Range of Alternatives

1. Standard of Review

An EIS must "[r]igorously explore and objectively evaluate all reasonable alternatives" and "[i]dentify the agency's preferred alternative." 40 C.F.R. § 1502.14(a), (e). "Judicial review of the range of alternatives considered by an agency is governed by a 'rule of reason' that requires an agency to set forth only those alternatives necessary to permit a 'reasoned choice.'" *California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982). "[T]he statute should not be employed as a crutch for chronic faultfinding." *Life of the Land v. Brinegar*, 485 F.2d 460, 472 (9th Cir. 1973) (upheld EIS where all three action alternatives consisted of variations on runway concepts and configurations).

The "range of alternatives that must be considered in the EIS need not extend beyond those reasonably related to the purposes of the project." *The Laguna Greenbelt, Inc. v. U.S. Dep't of Transp.*, 42 F.3d 517, 524 (9th Cir. 1994)

("*Laguna Greenbelt*") (citing *Angoon*, 803 F.2d at 1021-22.); *see also W. Watersheds*, 2013 WL 2532617 at *8 ("An EIS need not consider in detail an alternative that does not meet the purpose of the project."). An agency is not required to "consider alternatives which are infeasible, ineffective, or inconsistent with the basic policy objectives for the management of the area." *Headwaters, Inc. v. Bureau of Land Mgmt.*, 914 F.2d 1174, 1180 (9th Cir. 1990); *see also Seattle Audubon Society v. Moseley*, 80 F.3d 1401, 1404 (9th Cir. 1996) (agency not required to consider "alternatives that are unlikely to be implemented or those inconsistent with its basic policy objectives").

2. The EIS Appropriately Considered Planning Efforts, Including the Alternatives Analysis Integrated with NEPA Under the Federal Transit Program Governing Transit Guideway Investments

During the planning period for the Project, Congress **required** the preparation of an AA as the basis for the identification of a Locally Preferred Alternative. 49 U.S.C. §§ 5309(a)(1) and 5309(e)(3). Oddly, HonoluluTraffic makes no mention of this statutory mandate, but asserts that the Lead Agencies' use of the AA process to help determine the range of reasonable alternatives was "improper." Br. 23. This contention fails to address any of the following:

(1) The Council on Environmental Quality's NEPA regulations **require** federal agencies to cooperate with state and local agencies to the fullest extent possible in order to reduce duplication between NEPA and state and local

requirements. 40 C.F.R. § 1506.2; *see Laguna Greenbelt*, 42 F.3d at 524 & n.6. *See also* 1ER0084-0085.

(2) Federal law provided that the AA prepared by a state or local entity may be used to comply with NEPA if the Federal lead agency had provided guidance in its preparation and independently evaluated the document (23 U.S.C. § 139(c)(3)), and if the AA was conducted with public review and a reasonable opportunity to comment. 23 C.F.R. § 450.318(b)(2)(ii)-(iii). The District Court found that both of these conditions were met. 1ER0085-0086. HonoluluTraffic did not even disclose, much less address, these provisions.

(3) The 2005 regulations implementing SAFETEA-LU **specifically** provided that transportation planning processes may be used to screen alternatives and eliminate unreasonable alternatives. 23 C.F.R. § 450.318(a)(3). The AA may be used in the NEPA process, whether or not the AA was combined with the preparation of NEPA documents. *Id*. HonoluluTraffic does not disclose or address these provisions, which were a foundation of the District Court's conclusion that "the use of the AA to remove alternatives from consideration was not contrary to the statute or the regulations." 1ER0086.

Rather than addressing any regulations that implemented SAFETEA-LU, HonoluluTraffic merely asserts that 23 C.F.R., Part 450, Appendix A should be disregarded because it provided guidance rather than creating a binding rule for FTA and applicants. Br. 23-24. The Part 450 Appendix implemented Congress'

direction that federally funded transit projects "**must** flow from metropolitan and statewide transportation planning processes[.]" Part 450 Appendix at 123 (emphasis added). It "provides details on how information, analysis, and products from transportation planning can be incorporated into and relied upon in NEPA documents under existing laws." *Id.*

Specifically, for new transit projects,

> [T]he alternatives considered in the NEPA process may be narrowed in those instances that the planning Alternatives Analysis required by 49 U.S.C. 5309(e) is conducted as a planning study prior to the NEPA review. In fact, the FTA may be able to narrow the alternatives considered in detail in the NEPA document to the No–Build (No Action) alternative and the Locally Preferred Alternative.

Id. at 128.

The Part 450 Appendix specifically provides that alternatives that were found to be infeasible during the transportation planning process, or that were found not to meet purpose and need, "can be omitted from the detailed analysis of alternatives in the NEPA document, as long as the rationale for elimination is explained in the NEPA document." *Id.* at 129. The rationale was clearly explained in the NEPA document (3ER0555), and HonoluluTraffic does not contest that this requirement was met.

To further ensure compliance with NEPA, the Part 450 Appendix lists a series of steps, including public and agency involvement and documentation of the AA, to support elimination of potential alternatives. Part 450 Appendix, Question

12. HonoluluTraffic does not challenge compliance with these steps. It merely asserts that the Part 450 Appendix does not modify NEPA's general provisions regarding alternatives and that FTA is still required to include "reasonable" alternatives to the Project in the EIS. Br. 25-26.

The Part 450 Appendix does not "modify" NEPA. Rather, it provides FTA guidance to state and local governments on the application of NEPA's requirements in the context of federal-state transportation planning. It was included as part of comprehensive rulemaking to make transportation regulations consistent with SAFETEA-LU. As described in the draft rule,

> Since 1998, the FHWA and the FTA (in cooperation with Federal, environmental, resource, and regulatory agencies) have undertaken several initiatives to promote strengthened linkages between the transportation planning and project development/NEPA processes under existing legislative, statutory, and regulatory authorities. [O]n February 22, 2005, the FHWA and the FTA disseminated legal analysis and program guidance entitled "Linking the Transportation Planning and NEPA Processes." [T]his program guidance was intended to **articulate how information, analysis, and products from metropolitan and statewide transportation planning processes could be incorporated into and relied upon in the NEPA process under existing Federal statutes and regulations**.

71 Fed. Reg. 33510, 33517 (June 9, 2006).

The Part 450 Appendix provided the Agency's rationale for regulations adopted to implement SAFETEA-LU. As noted in the draft rule, "[p]roposed § 450.212 is structured around the guiding principles and legal opinion reflected in

the [Part 450 Appendix]." *Id.* at 33517. Through the Part 450 Appendix, FTA "provides explanatory information that amplifies the rule." 72 Fed. Reg. 7224, 7225 (Feb. 14, 2007). FTA ensured that the Part 450 Appendix "is consistent with the environmental streamlining requirements of § 6002 of the SAFETEA-LU." *Id.*

The Part 450 Appendix thus interprets both SAFETEA-LU and its implementing regulations. "When an agency interprets its own regulation, the Court, as a general rule, defers to it 'unless that interpretation is "plainly erroneous or inconsistent with the regulation."'" *Decker v. Northwest Envtl. Def. Ctr.*, 133 S.Ct. 1326, 1337 (2013), quoting *Chase Bank USA, N.A. v. McCoy*, 131 S.Ct. 871, 880 (2011). Guidance documents that persuasively express an agency's interpretation of a statute, such as the Part 450 Appendix, merit deference because they reflect the "'specialized experience and broader investigations and information' available to the agency" and "the value of uniformity in [the agency's] administrative and judicial understandings of what a national law requires.'" *U.S. v. Mead Corp.*, 533 U.S. 218, 234 (2001) *quoting Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140 (1944)). The Part 450 Appendix expresses the agency's interpretation of its own regulations and statute, and this interpretation merits the court's deference. The Lead Agencies appropriately implemented SAFETEA-LU and its implementing regulations as explained by this guidance.

Ironically, in light of their failure to address the statutory context, HonoluluTraffic attempts to distinguish *League of Wilderness* on the grounds that

the holding was context-specific. Br. 26. *League of Wilderness* upheld an EIS with only two alternatives, emphasizing that the court must consider the statutory context of the federal action at issue. 689 F.3d at 1070; *see also* 1ER0083-0084. When, as in the present case, a limited number of reasonable alternatives will meet the purpose and need, the EIS only needs to consider those alternatives in detail. *League of Wilderness*, 689 F.3d at 1072.

HonoluluTraffic's failure to address the statutory context also results in a puzzling discussion of "tiering." Br. 25. As the record and the District Court decision make clear, the AA process was based on the statutes and regulations cited above, not on the "tiering" provisions cited by HonoluluTraffic. None of the cases cited to support the "tiering" argument addresses an alternatives analysis -- or any other issue germane to this case. Here, the Court need not decide whether "tiering" provisions have been met, because the Lead Agencies did not rely on tiering.

The remaining cases cited by HonoluluTraffic, all involve failures to establish the preliminary planning, compliance with statutory intent, and detailed and well-supported justification of alternatives that characterize the Project's NEPA process. *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1038-39 (9th Cir. 2008) (because all alternatives in the EIS were based on a planning framework that the court had invalidated, the alternatives did not provide an informed choice); *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67

F.3d 723, 729 (9th Cir. 1995) (cancellation of a timber contract required reconsideration of the range of alternatives, because the EIS only examined alternatives that would meet the requirements of the cancelled contract); *'Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1098 (9th Cir. 2006) (when a planning level programmatic EIS failed to consider any locations outside of Hawai'i for the "transformation" of a brigade located in Hawai'i, the subsequent, site-specific EIS did not evaluate sufficient alternatives); *Or. Natural Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1123-24[13] (9th Cir. 2010) (stricture against "uncritical" privileging of one form of use over another on federal lands made the failure to consider any alternative that prevented off-road vehicle use a NEPA violation); *Natural Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 806-07, 814 (9th Cir. 2005) (Forest Service's conceded error in interpreting the data that formed the basis of alternatives resulted in the failure to consider a viable alternative).

Finally, HonoluluTraffic cites two cases **upholding** an agency decision not to consider alternatives because (1) substantial evidence showed that the alternative was unreasonable (*Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir. 1985)), and (2) the alternatives did not meet the project's purpose and need (*Surfrider Found. v. Dalton*, 989 F.Supp. 1309, 1327 (S.D. Cal. 1998) *aff'd* 196 F.3d 1057 (9th Cir. 1999)). As discussed below, the record in this

[13] This is the amended version of the case cited in Plaintiffs' brief.

case contains ample evidence that HonoluluTraffic's preferred alternatives were not reasonable and did not meet the Project's purpose and need.

3. The Lead Agencies Thoroughly Considered the "Managed Lane Alternative" and Supported the Determination That it is Not Reasonable

From the start of the process, HonoluluTraffic.com proposed a toll highway alternative to the Project, which HonoluluTraffic named the MLA. The Lead Agencies took this proposal very seriously and studied it over the course of several years. 21SER05367 (e-mail: City provides HonoluluTraffic.com's President, Cliff Slater, with a draft copy of the Project purpose and need, Dec. 6, 2005); 21SER05362 (City Department of Transportation Services will add an alternative that responds directly to Slater's proposal, Jan. 25, 2006); 21SER05360 (FTA ensures that the HonoluluTraffic.com alternative will be considered, April 6, 2006); 3SER00548-00549 (Final EIS App. G, Scoping Report [2006], stating that an additional variation of the MLA will be added to the AA, as requested by HonoluluTraffic.com); 11ER2737 (Alternatives Screening Memo, Oct. 24, 2006); 11ER2745-2746 (MLA will be carried forward, including two design and operational variations); 11E2836 ("Based on scoping comments, a second operational option was included under the [MLA]"); 11ER2853-2855 (Tables assessing the MLA along with other alternatives); 9ER2367-2488 (Alternatives Report: evaluates four alternatives, including two variations of the MLA, Nov. 1,

2006). HonoluluTraffic has no grounds for the claim that the NEPA process did not fully and fairly evaluate the MLA.

HonoluluTraffic failed to disclose the most significant information in the record about the MLA. The Lead Agencies' response to HonoluluTraffic.com's comments contains ten full pages explaining why the MLA alternative was not included in the EIS and responded to every concern. 2SER00245-00254. The response explains the process of screening alternatives and notes that a reversible MLA was fully evaluated, but that it performed poorly on a broad range of metrics. 2SER00246-00247; *see also* 4ER1031-1033. The response explains that the MLA "would not have achieved project goals and objectives, would not result in substantially fewer environmental impacts, and would not be financially feasible." 2SER00250; *see also* 4ER1031-1034. The Final EIS also added substantial additional information to Chapters 2 and 8 to explain why the MLA was not included in the Final EIS. *See* 2SER00254 (noting that the MLA "performed poorly compared to the Fixed Guideway Alternative on a broad range of metrics"); 3ER0560 (Final EIS Ch. 2, finding, *inter alia*, that the MLA did not meet purpose and need); 4ER1031-1035 (Final EIS Ch. 8, explaining the decision not to include or revisit the MLA).

The Final EIS and responses to comments also address HonoluluTraffic's claim that NEPA was violated because the **precise form** of the MLA proposed by HonoluluTraffic was not addressed. Br. 60. The Final EIS states:

> Comments received about the [MLA] referenced in the Draft EIS suggested there were significant differences between the alternative studied in the Alternatives Analysis and an ideal managed lane option. However, there was no substantial difference between the alternatives proposed in comments and those studied in the Alternatives Analysis that would have resulted in a different outcome.

4ER1034-1035; 2SER00250. The Final EIS further discusses issues of apparent divergence, concluding that "[w]hile there may be some minor details of the proposed alternatives that differ from the Alternative Analysis alternatives, the evaluation assesses the concept fairly in the context of the Project's Purpose and Need." 4ER1035; 2SER00250-00251. The Final EIS is not required to include a "separate analysis of alternatives which are not significantly distinguishable from alternatives actually considered, or which have substantially similar consequences." *Westlands*, 376 F.3d at 868.

Moreover, the lead agency is not required to consider an alternative that is inconsistent with the basic policy objective governing the project. *Laguna Greenbelt*, 42 F.3d at 524-25 (Ninth Circuit upheld an EIS that did not incorporate an alternative proposed by opponents, based on the lead agency's determination that the alternative would not accomplish the project goal of reducing congestion). Here, the MLA would actually "increase transit travel times," and therefore not meet the basic policy objective governing the Project. 1SER00249; *see also* 2ER0253 (ROD: the MLA "failed to meet the Project's purpose and need as it would not have improved corridor mobility or travel reliability"). Furthermore, the

MLA would generate the greatest amount of air pollution, require the greatest amount of energy for transportation use, and result in the largest number of noise impacts. Significantly, the MLA would provide little community benefit, because it would not substantially improve transit access to the corridor. 1SER00250. Fundamentally, the MLA simply does not meet the important project goal of improved transit access for lower income populations.

HonoluluTraffic asserts that the omission of a "three-lane" MLA was unreasonable. Br. 27. HonoluluTraffic.com first mentioned a three-lane MLA in conjunction with its promotion of Tampa's system for Honolulu. The reasons that the Tampa system was not adopted are addressed in response to HonoluluTraffic.com's comments. 1SER00243, 00252-00255. The three lane option was part of the EZWay proposal made by a mayoral candidate who opposed transit. *See* 1SER00193. The reasons for not considering the EZWay project are described at 1SER00254-00255. The Final EIS documents the consideration of variations on the MLA in Chapter 8. 5SER01033-01034.

HonoluluTraffic also refers to "erroneous financial information" and eligibility for federal transportation funding. Br. 28. The Final EIS responds to these assertions regarding financial information, summarizing the evidence, including a 2007 Cost Validation Analysis and Report prepared by FTA's Project Management Oversight Contractor in response to concerns that the MLA had not been assessed properly. 1SER00252-00255. The Final EIS concludes that the cost

estimate for the MLA followed the same methodology as every other alternative. *See also* 21SER05354; 21SER05355; 21SER05351 (City's efforts to verify HonoluluTraffic.com's estimate of MLA cost). With respect to eligibility for federal funding, the Alternatives Report states that the MLA "would not be eligible for New Starts funding because of use by toll-paying single-occupancy vehicles, which are excluded from the statutory definition of 'fixed guideway' (49 U.S.C. § 5302)." 9ER2459; *see also* 21SER05356 (Aug. 23, 2007 e-mail from HonoluluTraffic.com recognizing that MLAs could not be funded without a change in the law, which did not occur, *see* 74 Fed. Reg. 7388 (Feb. 27, 2009)); 21SER05357-05358 (Oct. 24, 2006 e-mail from FTA to the City: MLA not eligible for New Starts funding). The financial feasibility assessment of the MLA explained that the alternative was not eligible for surcharge revenues. Therefore, the financial feasibility of the capital investment was assessed based on existing local bond funding and toll revenues. 9ER2463-2464.

HonoluluTraffic references an "open letter" by an official with the Tampa-Hillsborough (Florida) Authority, apparently responding to a City official's comments reported in a newspaper. Br. 28, n.13. HonoluluTraffic fails to disclose that HonoluluTraffic.com discussed the Tampa example at length in its comments on the Draft EIS. 2SER00177, 00184-00190, 00234-00235, 00240. This response showed that there was no "misrepresentation" of costs or operations of the Tampa project. 2SER00252-00255; *see also* 20SER05078 (Task Force concluded that the

projects are sufficiently different to make a cost comparison unreasonable).

Finally, HonoluluTraffic claims a lack of "follow through" on Transit Task Force recommendations. As stated in the Final EIS, the Task Force found the AA presentation and assessment of the MLA to be "fair and accurate," and suggested operational variations of the MLA. 2SER00251. The Lead Agencies assessed these variations and concluded that "the suggestions of the Task Force were not substantive in improving [MLA] performance overall and would not have resulted in a change in the relative merits of the alternatives evaluated." *Id*.

As the District Court recognized, "[it] was not unreasonable for Defendants to refuse to reassess a new version of the MLA in the FEIS, because there was no indication that the AA's assessment of the MLA was inaccurate or that changes to the MLA design would have made a difference." 1ER0088.

4. Light Rail is Not a Reasonable Alternative

For the first time in this case, HonoluluTraffic asserts that light rail is a "presumptively reasonable option." Br. 29-30.[14] While it is too late for HonoluluTraffic to raise a new issue (*Smith v. Marsh*, 194 F.3d at 1052), their claims can be disposed of quickly.

[14] In the District Court, HonoluluTraffic raised claims regarding light rail with respect to Section 4(f) compliance, but **not** as a NEPA issue. The District Court mentioned light rail in passing when it ruled on HonoluluTraffic's claim regarding the analysis of alternatives to steel-on-steel technology. 1ER0088.

HonoluluTraffic's suggestion that light rail was eliminated by a "panel of experts," which provided input on the appropriate technology for the Project (Br. 31), is simply wrong. The record establishes that the approved "steel-wheel-on-steel-rail" technology was applicable to both light rail and to the Project. *See*, *e.g.*, 2SER00169, 00170, 00172, 00173, 00174, 00175, 00271-00272, 00273, 00292, 00293, 00294-00295, 00296, 00297, 00298, 00299 (the five-member technology panel evaluated guided rubber-tire-on-concrete systems, monorail, magnetic levitation, and "steel-wheel-on-steel-rail systems" (*i.e.*, light rail and rapid rail)). This technology choice did not eliminate light rail.

Two versions of light rail were considered during the screening and AA process: corridor-wide light rail, which was evaluated during the screening process, and light rail in the downtown portions of the corridor. Neither alternative met purpose and need, for reasons explained at length in the EIS (including in responses to HonoluluTraffic.com's comments). 3ER0552-0562.

The Final EIS explains that "[c]orridor-wide at-grade light-rail transit was rejected because it would have required conversion of traffic lanes to rail throughout the corridor, thereby substantially reducing roadway capacity since no abandoned or undeveloped alignments are available in the study corridor." 3ER0554. An at-grade system "would not have provided a reliable, high-capacity, exclusive right-of-way system." 3ER0555. Short blocks in downtown would have limited the length of trains to two vehicles, and average speed would be

approximately one-half of an exclusive right of way system. *Id.* Because excavation would be required for the entire length of the at-grade system, the potential for disturbance of burials or archaeological resources would be much greater. *Id.* This led to the determination, in 2005-2006 during the AA, that corridor-wide light rail would not be a reasonable alternative. 3ER0554-0555.

The AA then evaluated the reasonableness of light rail in portions of the corridor. Light rail was not carried forward because it would reduce ridership throughout the system and would not meet the purpose of providing high capacity rapid transit. Light rail would have decreased system speed, capacity, reliability, and roadway capacity and speed, had the greatest potential for disturbance of burials or archaeological resources, and caused the greatest number of residential displacements. 3ER0562, Table 2-3; 3ER325; 1023, 1036; 2SER00161-00164; 00268-00270 (responses to HonoluluTraffic.com).

HonoluluTraffic ignores this record, instead focusing on a single factor – the fact that light rail would prevent expansion of service – to argue that this single factor does not violate purpose and need. Br. 30-31. HonoluluTraffic ignores the fact that the Project's "need" includes improving mobility and reliability, and the record explains that the limited capacity of an at-grade system would not support the need for high-capacity transit. 2SER00268-00269. Without the ability to expand service to meet future needs, the "need" to increase mobility and reliability will not be met. Furthermore, HonoluluTraffic ignores the remaining reasons that

light rail will not meet purpose and need, including slower speeds resulting in "longer travel times and far less reliability," and increased congestion throughout downtown. *See, e.g.*, *id.*; 2SER00269-00270.

The "need" to improve corridor travel reliability includes the need to reduce delays caused by traffic accidents. 3ER0546. The need for reliable mobility is especially significant in areas where people of limited income and an aging population live. *Id.* These "needs" factored into the Lead Agencies' determination that light rail would lead to an unacceptable crash hazard. As summarized in the response to HonoluluTraffic.com's comments:

> Where pedestrians and automobiles cross the tracks in the street network, particularly in areas of high activity (e.g., station areas or intersections), there is a risk of collisions involving trains that does not exist with an elevated system. There is evidence of crashes between trains and cars and trains and pedestrians at other at-grade systems throughout the country. This potential would be high in the Chinatown and Downtown neighborhoods, where the number of pedestrians is high and the aging population presents a particular risk.

2SER00269-00270. HonoluluTraffic's assertion that the record contains "no evidence" that light rail systems in other areas have created "unacceptable" safety problems is both untrue and irrelevant. Other cities may not face the specific conditions that concerned the Lead Agencies about Chinatown and downtown. In any case, the record contains evidence of unsafe conditions, as discussed above and elsewhere in the record. 2SER00164, 00165, 00166, 00167, 00168 (detailed answer); 2SER00484, 00494, 00497. The court should defer to this technical

determination by the agency with expertise. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989) ("*Or. Natural Res. Council*"); *Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008) (*en banc*) ("*Lands Council*").

III. FTA COMPLIED WITH SECTION 4(f)

FTA carefully evaluated the Project's potential use of parks and historic resources as required by Section 4(f). FTA conducted an extensive evaluation of forty-seven Section 4(f) sites in the vicinity of the Project, including the evaluation of avoidance alternatives, and incorporated measures to minimize harm. 4ER0913-0985. The Lead Agencies coordinated the evaluation of potential impacts on historic sites subject to Section 4(f) with the SHPO, and the conclusions of the Section 4(f) analysis concerning historic properties reflect the recommendations of the SHPO.

As an initial matter, HonoluluTraffic (Br. 2, 5) and National Trust (Am. Br. 9-14) misstate the impact of the Project on the Chinatown Historic District and Dillingham Transportation Building. While the 4(f) evaluation found a "use" of these two properties, the impacts to these properties were solely to noncontributing (*i.e.*, non-historical) elements. See 4ER0951-0952 (Project guideway and station will not impair contributing elements of Chinatown); 0954 (Project station will use plaza for station entrance, but plaza is not a contributing element of Dillingham Transportation Building); 24SER05972, 05988.

FTA's 4(f) determinations apply faithfully FTA's extensive regulations. 23 C.F.R. §§ 774.1 – 774.17. Where, as here, an agency interprets its regulations, the court is required to defers to the agency "'unless that interpretation is "plainly erroneous or inconsistent with the regulation.'"" *Decker*, 133 S.Ct. at 1337.

A. FTA Is Not Required to Evaluate Potential Alternatives that are Not Feasible and Prudent

The City incorporates by reference FTA's discussion of this issue.

B. FTA Adequately Documented its Section 4(f) Findings

HonoluluTraffic incorrectly claim that the regulations required FTA to formally document its findings of imprudence in its Section 4(f) evaluation. Br. 39.

HonoluluTraffic cites 23 C.F.R. § 774.3(a) and 774.7(a) to support its assertion. Section 774.3(a) merely sets forth the determinations that must be made prior to approving the use of a Section 4(f) property. It does not require determinations beyond those set forth in the statute. The second cited provision, 23 C.F.R. section 774.7(a), describes the contents of the record supporting Section 4(f) evaluations. The record must "include sufficient supporting documentation to demonstrate why there is no feasible and prudent avoidance alternative" and "summarize the results of all possible planning to minimize harm to the Section 4(f) property." By including the Section 4(f) findings and referencing the Final EIS, the ROD includes and references all of the supporting documentation required by the regulation. 2ER0258-0259. The actual 4(f)

determination may be contained in the Final EIS or the ROD. 23 C.F.R. § 774.7(e)(3).

1. Managed Lane Alternative

HonoluluTraffic and National Trust contend that the Lead Agencies rejected the MLA without having ever determined that it was imprudent as defined by the Section 4(f) regulations. Br. 41; Am. Br. 20-21. National Trust also asserts that the Lead Agencies' findings regarding imprudence of the MLA are nothing more than "*post hoc* rationalizations." Am. Br. 19-20. HonoluluTraffic and National Trust mischaracterize the record.

Two versions of the MLA were evaluated during the AA, including an alternative that was substantially similar to the alternative proposed in HonoluluTraffic.com's comment letter. 9ER2367-2368, 2402-2403.

Contrary to National Trust's assertion, the AA demonstrated that the MLA would not meet the Project's purpose and need. 3ER0557-0560; 9ER2367-2488. Specifically, the MLA would not improve corridor mobility, would only minimally encourage patterns of smart growth and economic development, and would not improve service or access to transit for transit-dependent communities. 9ER2474-2477.

FTA was not required to formally state that it found the MLA "not prudent." FTA adopted the City's evaluation that the MLA would not accomplish the purpose and need for the Project. 3ER0552-0564; 2ER0253. HonoluluTraffic was

informed of FTA's decision in its response to HonoluluTraffic.com's comments on the Draft EIS. 2SER00186-00254. Because the MLA would not meet the purpose and need of the Project, the MLA is not a prudent alternative to avoid use of Section 4(f) resources. *See, e.g.*, *Alaska Ctr. for the Envt. v. Armbrister*, 131 F.3d 1285, 1288 (9th Cir. 1997) ("*Alaska Ctr. for the Envt.*"); *Ariz. Past and Future Found., Inc. v. Lewis*, 722 F.2d 1423, 1428 (9th Cir. 1983).

The Lead Agencies conducted extensive studies to evaluate potential alternatives, including the MLA. They are entitled to rely on the conclusions of their experts. *See Or. Natural Res. Council*, 490 U.S. at 378; *Lands Council*, 537 F.3d at 1000. Because FTA determined that the MLA was not prudent, no further analysis was required. *See Alaska Ctr. for the Envt.*, 131 F.3d at 1288.

2. Bus Rapid Transit

HonoluluTraffic also argues that FTA's elimination of BRT from detailed review as an avoidance alternative was arbitrary and capricious. Br. 47. HonoluluTraffic again cherry-picks evidence in the record. It ignores relevant information demonstrating that FTA did, in fact, consider an alternative substantially similar to BRT during the AA process, and found that it did not meet the Project's purpose and need.

HonoluluTraffic attempts to distinguish the BRT system evaluated in the 2002 HEPA Final EIS and 2003 EIS from the TSM alternative reviewed and rejected as imprudent during the AA process. Br. 46. In fact, a comparison of

BRT with the TSM alternative demonstrates that they are substantially similar. Like the BRT system, the TSM alternative included an enhanced bus system and improvements on selected roadways to provide priority to buses. 10ER2569 (Alternatives Screening Memo). As noted in the Final EIS, the TSM alternative optimized bus service, per FTA guidelines, by increasing bus service, but without building a new fixed guideway for transit. 3ER0557. It included express bus service that operated as bus rapid transit in existing facilities, with modifications to the H-1 zipper lanes. *Id.*

HonoluluTraffic argues that the TSM alternative is not the same as BRT because it did not implement a system of dedicated bus lanes. Br. 46. This is misleading. The "exclusive" bus lanes in the 2003 EIS comprised only a fraction of the overall BRT project. *See* 5SER01091, 01124-01126.

During the AA process, the City noted that the TSM alternative did not provide high-capacity service and, when operating in mixed traffic, could not provide predictable, reliable travel times. 11ER2779. Moreover, the City found that it was unlikely to generate significant development opportunities. ***Id.***

In a response to a comment on the Draft EIS, the City noted that BRT was a variation on the TSM alternative evaluated in the AA, and that its overall system benefit was very low. 2SER00254. The Final EIS found that the TSM alternative, which was similar to BRT, did not meet the Project's purpose and need because it did not support the Honolulu General Plan and resulted in only minimal reduction

in vehicle miles traveled and vehicle hours of delay. 3ER0554 (Table 2-1). Since most buses would still operate in mixed traffic, the TSM alternative did little to improve corridor mobility and travel reliability. It did not support the City's goals of concentrating growth within the corridor and reducing development pressures in rural areas. 3ER0554. Because the TSM alternative did not improve corridor reliability and mobility, it did not meet the Project's purpose and need. 3ER0562.

Citing the 2030 ORTP, the Project's purpose includes providing faster, more reliable public transportation service in the Project corridor. 3ER0545. The Final EIS notes that the TSM alternative failed to meet this purpose. 3ER0557 ("Since most buses would still operate in mixed traffic, the TSM Alternative would have done little to improve corridor mobility and travel reliability.").

C. FTA Complied with Section 4(f) In Its Evaluation of Native Hawaiian Burial Sites

1. FTA Evaluated the Entire Corridor Prior to its 4(f) Approval

HonoluluTraffic's and National Trust's claim that FTA deferred or failed to evaluate the Project's potential impacts on burials is simply false. An **objective** evaluation of the **whole record** reveals that the Lead Agencies conducted a comprehensive evaluation of potential Native Hawaiian burials. *See*, *e.g.*, 8ER2051-2257; 16SER04059-04073; 16SER04074-17SER04526.

No amount of pre-construction sampling or surveying can reveal every resource underlying a 20-mile rail corridor. The Final EIS disclosed the potential

risk for discovery of unknown burials during construction. 4ER0924-0953. The Advisory Council and the SHPO approved measures requiring ground penetrating AISs be completed prior to construction of each of the Project's construction phases. *Id.*

The Lead Agencies evaluated the Project's potential use of archaeological resources, and appropriately incorporated the studies and consultations conducted under Section 106 of the NHPA. 23 C.F.R. § 774.11(e); 8ER2051-2257; 16SER04059-04273; 17SER04274-04526

The evaluation of archaeological sites began as soon as work started on the Draft EIS. In 2006, the City conducted an initial identification of potential historic and cultural resources as part of the preparation of the AA required by Congress for all "New Starts" projects. 8ER2084-2087; 16SER04083-04084; 17SER04300; *see* 49 U.S.C. § 5309(c)(1). The Alternatives Analysis Archaeological Report synthesized information from U.S. Department of Agriculture soils survey data, which provided insight as to the possible location of archaeological and burial materials; previous archaeological investigation results; previously recorded archaeological resources; historic land records; and previously recorded burial locations. 8ER2084-2087.

Building on the AA Archaeological Report, the Lead Agencies prepared the Technical Report, dated August 15, 2008, for the **entire Project**. 8ER2051-2257. The Technical Report contains a detailed discussion of the "Affected

Environment" for each sub-area of the Project, which includes an identification of all known resources. 8ER2089-2180. It further discusses the Project's potential consequences, including discussion of any potential impacts to known burials. 8ER2181-2196. The Technical Report acknowledges the possibility of unknown burials, noting that, for most of the study area, any such potential resources are buried beneath urban development. 8ER2181. It concluded that, with the exception of direct, construction-related impacts, the Project's construction would pose no additional impacts to any burials beyond existing conditions. *Id.*

In addition to this comprehensive work leading up to the Section 4(f) determination, the Lead Agencies, the SHPO, and the Advisory Council established a process for additional studies of unknown and unidentified below ground archaeological resources after the ROD but prior to the start of any construction that might disturb an unknown resource. 2ER0300; 8ER2051. This approach reduced the potential to unnecessarily disturb unknown archaeological resources before final column locations were set. 8ER2079; 21SER05287-05288. The SHPO and the Advisory Council concurred in the archaeological resources evaluation methodology. 2ER0300-0340; 18SER04531; 21SER05287-05288.

HonoluluTraffic and National Trust fail to cite the regulations that provide the basis for this comprehensive and detailed process. Instead, they attempt to distinguish between the Section 4(f) and Section 106 regulations to argue that Section 4(f) does not allow phased review of a Project's impacts. Br. 48-53; Am.

Br. 25. However, the Lead Agencies' additional effort to identify potential unknown burials is not a "phased" Section 4(f) review.

Here, the Lead Agencies conducted extensive reviews of archaeological resources along the entire Project corridor. These reviews complied with the requisite level of effort required to identify historic resources. 36 C.F.R. § 800.4(b)(1) (identifying level of effort necessary to identify properties in the Area of Potential Effect that may be on or eligible for the National Register of Historic Places ("National Register")); 23 C.F.R. § 774.17 (defining "historic site" for Section 4(f) purposes as those sites "included in, or eligible for inclusion in, the National Register").[15] This Court has recognized the relationship between the Section 106 review process to identify historical resources and the subsequent identification of any impacts to those resources via Section 4(f) review. *See North Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147, 1159 (9th Cir. 2008) ("*North Idaho*") (noting that the Section 4(f) evaluation necessarily follows Section 106 identification efforts).

The Lead Agencies' effort to identify unknown archaeological sites more than satisfied the standard established in the Advisory Council's regulations, which require a "reasonable and good faith effort to carry out appropriate identification

[15] Indeed, FTA's Section 4(f) regulations contemplate discovery of unidentified burials after required reviews have been completed. *See* 23 C.F.R. §§ 774.9(e); 774.11(f); 774.13(b).

efforts." 36 C.F.R. § 800.4(b)(1). Such "efforts" must "take into account past planning, research and studies" and **may** include additional types of research, including sampling and field surveys. 36 C.F.R. § 800.4(b)(1). Notably, the regulation **does not require** below ground surveys. The Advisory Council adopted this regulation to provide federal agencies and the SHPO "flexibility" in defining appropriate studies to identify "historic" resources. 65 Fed. Reg. 77698, 77719 (Dec. 12, 2000).

Importantly, the SHPO and the Advisory Council concurred that FTA conducted an adequate evaluation of potential archaeological sites. 2ER0300, 0304, 0338-0339. *See* 36 C.F.R. §§ 800.4(c)(2) (authority not to concur with the federal agency determination of eligibility), 800.4(d)(2) (authority not to concur with lead agency evaluation), 800.5(c). Advisory Council's and SHPO's concurrence in FTA's methodology establishes that FTA's approach to the evaluation of **potential** archaeological sites was not arbitrary and capricious. *See Lands Council*, 537 F.3d at 993 ("[Courts] are not free to 'impose on the agency [our] own notion of which procedures are 'best' or most likely to further some vague, undefined public good.'") (quoting *Churchill Cnty. v. Norton,* 276 F.3d 1060, 1072 (9th Cir. 2001).

The extensive record of planning along the **entire** Project route establishes that HonoluluTraffic's reliance on *North Idaho* is misplaced. In *North Idaho*, the FHWA and the state transportation department conceded that they had only

conducted the Section 4(f) evaluation and the Section 106 identification process for one out of four phases of a highway project. There was no dispute that they had "not conducted the necessary identification and evaluation for the other phases of the Project." *North Idaho,* 545 F.3d at 1159 n.8.

Here, in distinct contrast, there was no deferral of required Section 4(f) reviews. An extensive review was conducted along the entire 20-mile corridor. 4ER0913-0985-1057.

HonoluluTraffic and National Trust also cite *Corridor H Alternatives, Inc. v. Slater*, 166 F.3d 368, 371-72 (D.C. Cir. 1999) ("*Corridor H*"). In *Corridor H* the **entire** Section 4(f) and Section 106 analysis was deferred until after the ROD. *Id.* at 371. The agencies had not made any type of preliminary Section 4(f) investigation or determination. *Id*. at 373. In the present case, all known and reasonably knowable historic resources were identified, and a reasonable good faith effort was made to identify unknown underground resources, as part of the EIS/Section 4(f) process. Moreover, the *Corridor H* analysis distinguishes the situation in *Corridor H* from situations where underground archaeological resources cannot reasonably be identified until later in the project development process. *See City of Alexandria v. Slater*, 198 F.3d 862, 872-73 (D.C. Cir. 1999) ("*Alexandria*").

The exhaustive research, interview, and survey process described above identified all known and knowable archaeological resources along the entire length

of the Project. This record of extensive outreach, consultation, and the agreement of stakeholder agencies with FTA's evaluation of resources along the entire corridor distinguishes the Section 4(f) evaluation for the Project from *North Idaho*, *Corridor H*, and the other cases cited by HonoluluTraffic. As the District Court noted, "in contrast to *North Idaho* . . . and *Corridor H*, [the Lead Agencies] here have not deferred *all* Section 4(f) site identification to a later date; in fact, [the Lead Agencies] have made a significant effort to identify all known burials and predict the location of unknown burials." 1ER0060.

In fact, the City recently completed fieldwork for the AISs for Phases 1 through 4, and no human skeletal remains were found in Phases 1, 2 and 3. Miyamoto Decl., ¶ 6. Human skeletal remains were discovered within a few discrete trenches in Phase 4,[16] and, consistent with the City's prior commitment, the Project has been modified to avoid all identified human skeletal remains. *Id.*; 2ER0311. Accordingly, the Project has been designed to avoid any potential Section 4(f) "use" of the few identified human skeletal remains, whether or not those remains qualify for Section 4(f) protection.

[16] As noted by the Draft AIS Report for Phase 4, all eligible sites are eligible under National Register criterion D only. Miyamoto Decl., ¶ 5; Ex. A at 58. Thus, Section 4(f) does not apply. 23 C.F.R. § 774.13(b)(1).

2. The Evaluation of Unknown and Unidentified Burials Complied with Section 4(f)

HonoluluTraffic erroneously claim that all Native Hawaiian burial sites are eligible for protection as "historic sites" under Section 4(f). Br. 48. No archaeological sites – including burials – are subject to Section 4(f) unless they are first determined to be "eligible for inclusion on the National Register." 23 C.F.R. §§ 774.17 (definition of "Historic site"), 774.11(d)(1) (applicability). While it is possible that a burial discovered in the future could meet the requirements of eligibility for inclusion, the issue here is the appropriate level of effort for searching for unknown resources that have not been determined to be eligible for listing in the National Register.

HonoluluTraffic's discussion of Section 4(f) as it **may** apply to Native Hawaiian burials ultimately makes one legal point. HonoluluTraffic's position is that Section 4(f) **requires** FTA to assess the presence of unknown, unidentified Native Hawaiian burials by completing below-ground surveys for unknown burials on every inch of the alternative Project alignments prior to the approval of the Project. HonoluluTraffic has failed to establish that Section 4(f) requires its preferred approach or that FTA's careful, reasonable approach to the investigation and avoidance of unknown, unidentified burials is arbitrary and capricious.

The Technical Report summarizes the Project's likely impacts on subsurface archaeological resources as follows:

> With few exceptions, the archaeological resources that could be affected by the Project consist of subsurface deposits, including burials [and other remains]. **Throughout most of the archaeological study area, these subsurface resources are buried beneath roadways, residences, businesses, and parking lots**. [W]ith the exception of direct, construction-related impacts (e.g., disturbance caused by the excavation of a foundation), the Project's construction would pose no additional impacts to these subsurface archaeological resources than what they have already been exposed to (e.g., through traffic vibration).

8ER2081 (emphasis added).

HonoluluTraffic's claim that FTA should have conducted additional underground surveys must be evaluated in this context. Except for part of its west end, most of the Project is in the heavily urbanized areas of Pearl Harbor, the Airport, and Downtown Honolulu. 3ER0529-0530.

HonoluluTraffic and National Trust fail to reveal that many of the subareas that were found to have a higher probability of containing burials – ***e.g.***, Dillingham Boulevard, downtown Honolulu, and Kaka'ako – are "urban centers." 3ER0686. Below-ground surveys could only be conducted in these areas with enormous disruption. 8ER2079. Cost and time requirements are significant "because of the need to disrupt traffic, saw-cut and remove existing pavement to expose underlying sediments, search for archaeological deposits, and then repave the affected area." *Id.*; *see also* 24SER05994 (location where 4 trenches were dug as part of AIS process) (shown below).

24SER05994

Even more significantly, HonoluluTraffic fails to disclose that below-ground surveys conducted before the completion of detailed engineering, which will provide the specific location of guideway columns, could have needlessly disturbed archaeological resources. As the Technical Report states,

> Until there is certainty regarding column placement, any archaeological testing associated with the Project's archaeological historic property/archaeological resource identification effort could be outside the actual project footprint and **could disturb archaeological resources that would otherwise not be disturbed by the Project**.

8ER2079 (emphasis added); *see also* 21SER05287-05292.

To avoid causing enormous, unnecessary environmental damage, FTA needed to know the preferred alternative, which was only identified in the Final

EIS, and the specific location of guideway columns, which required more detailed engineering of the selected alternative. 8ER2079; 21SER05287-05292. The engineering studies necessary to provide this information are at a level of detail beyond what is appropriate prior to the approval of the Final EIS. 23 C.F.R. § 771.113(a); *see also* 40 C.F.R. § 1506.1(a)(1) (minimizing environmental impacts prior to project approval).

In response to these practical and legal constraints, the Lead Agencies adopted a methodology that was approved by the SHPO and the Advisory Council. 2ER0300-0340; 4ER0851-0857. The Lead Agencies committed to conduct additional below ground surveys for unknown and unidentified burials and other cultural resources as soon as more detailed engineering allowed the identification of the precise areas that would be disturbed by the guideway and station construction. 2ER0308-0312; 4ER0851-0857.

The Lead Agencies previously agreed that if any burials that are eligible for the National Register are identified during the AISs, the design of the Project would be modified to preserve the burials in place. These commitments avoid any "use" of any burial site that is subject to Section 4(f). 2ER0308-0312; 4ER0851-0857; Miyamoto Decl., ¶ 7.

Valley Cmty. Preservation Comm'n v. Mineta, 373 F.3d 1078 (10th Cir. 2004) ("*Valley Cmty.* Preservation") supports the Lead Agencies' approach to burials. There the court held that FHWA complied with Section 4(f) where the

agency had made significant efforts to evaluate historic properties along the project corridor and to determine adverse effects, but deferred investigation of potential, but **unidentified**, Section 4(f) Properties until after the ROD. *Id.* at 1089. The court held that plaintiffs failed to establish that the agency "declined to follow the necessary procedural requirements by adopting the [programmatic agreement] and deferring the evaluation of certain properties until after the issuance of the ROD." *Id.*

Similarly, in *Alexandria*, 198 F.3d 862, the D.C. Circuit upheld the FHWA's Section 4(f) analysis, which included a survey of historic sites but did not include below-ground surveys for potential, but unknown, historic sites in several portions of the project area (construction staging areas and dredge oil disposal sites). 198 F.3d at 872. The court held that "the precise identification of these sites requires 'substantial engineering work' that is not conducted until the design stage of the project." *Id*. at 873. The court reasoned that "indeed, the Administration [was] required to conduct such 'final design activities' *after* it complete[d] its Final EIS." *Id.* (emphasis in original).

Here, the analysis of archaeological resources followed the approach approved in *Valley Cmty. Preservation* and *Alexandria*. FTA's evaluation reflects comprehensive analysis of potential impacts to Section 4(f) Properties – both known and unknown.

In conclusion, the City respectfully requests dismissal of this appeal.

DATED: June 19, 2013

Respectfully submitted,

By: /s/ *Robert D. Thornton*
ROBERT D. THORNTON
EDWARD V. A. KUSSY
JOHN P. MANAUT
LINDSAY N. MCANEELEY
DONNA Y. L. LEONG
DON S. KITAOKA

Attorneys for Defendants/Appellees
THE CITY AND COUNTY OF HONOLULU and MICHAEL FORMBY, in his official capacity as Director of the City and County of Honolulu Department of Transportation Services

RELATED CASES

Appellees do not know of any related cases pending in this Court.

9th Circuit Case Number: 13-15277

CERTIFICATE OF COMPLIANCE

The undersigned certifies that, according to the word count provided by Microsoft Word 2003, the body of the foregoing brief contains **13,435** words, exclusive of those parts excluded by Fed. R. App. P. 32(a)(7)(B)(iii), which is less than the 14,000 words permitted by Fed. R. App. P. 32(a)(7)(B). The text of the brief is in 14-point Times New Roman, which is proportionately spaced. See Fed. R. App. P. 32(a)(5), (6).

DATED: June 19, 2013

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By: /s/ *Robert D. Thornton*
ROBERT D. THORNTON
EDWARD V. A. KUSSY
JOHN P. MANAUT
LINDSAY N. MCANEELEY
DONNA Y. L. LEONG
DON S. KITAOKA

Attorneys for Defendants/Appellees
THE CITY AND COUNTY OF HONOLULU and MICHAEL FORMBY, in his official capacity as Director of the City and County of Honolulu Department of Transportation Services

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ADDENDUM

5 U.S.C. § 706

Title 5. Government Organization and Employees
Part I. The Agencies Generally
Chapter 7. Judicial Review

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this titleor otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

23 U.S.C. § 139
(Pre-2012 Amendment)

Title 23. Highways
Chapter 1. Federal-Aid Highways

§ 139. Efficient environmental reviews for project decisionmaking

(a) Definitions.--In this section, the following definitions apply:

(1) Agency.--The term "agency" means any agency, department, or other unit of Federal, State, local, or Indian tribal government.

(2) Environmental impact statement.--The term "environmental impact statement" means the detailed statement of environmental impacts required to be prepared under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(3) Environmental review process.—

(A) In general.--The term "environmental review process" means the process for preparing for a project an environmental impact statement, environmental assessment, categorical exclusion, or other document prepared under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(B) Inclusions.--The term "environmental review process" includes the process for and completion of any environmental permit, approval, review, or study required for a project under any Federal law other than the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(4) Lead agency.--The term "lead agency" means the Department of Transportation and, if applicable, any State or local governmental entity serving as a joint lead agency pursuant to this section.

(5) Multimodal project.--The term "multimodal project" means a project funded, in whole or in part, under this title or chapter 53 of title 49 and involving the participation of more than one Department of Transportation administration or agency.

(6) Project.--The term "project" means any highway project, public transportation capital project, or multimodal project that requires the approval of the Secretary.

(7) Project sponsor.--The term "project sponsor" means the agency or other entity, including any private or public-private entity, that seeks approval of the Secretary for a project.

(8) State transportation department.--The term "State transportation department" means any statewide agency of a State with responsibility for one or more modes of transportation.

(b) Applicability.—

(1) In general.--The project development procedures in this section are applicable to all projects for which an environmental impact statement is prepared under the National Environmental Policy Act of 1969 and may be applied, to the extent determined appropriate by the Secretary, to other projects for which an environmental document is prepared pursuant to such Act.

(2) Flexibility.--Any authorities granted in this section may be exercised for a project, class of projects, or program of projects.

(c) Lead Agencies.--

(1) Federal lead agency.--The Department of Transportation shall be the Federal lead agency in the environmental review process for a project.

(2) Joint lead agencies.--Nothing in this section precludes another agency from being a joint lead agency in accordance with regulations under the National Environmental Policy Act of 1969.

(3) Project sponsor as joint lead agency.--Any project sponsor that is a State or local governmental entity receiving funds under this title or chapter 53 of title 49 for the project shall serve as a joint lead agency with the Department for purposes of preparing any environmental document under the National Environmental Policy Act of 1969 and may prepare any such environmental document required in support of any action or approval by the Secretary if the Federal lead agency furnishes guidance in such preparation and independently evaluates such document and the document is approved and adopted by the

Secretary prior to the Secretary taking any subsequent action or making any approval based on such document, whether or not the Secretary's action or approval results in Federal funding.

(4) Ensuring compliance.--The Secretary shall ensure that the project sponsor complies with all design and mitigation commitments made jointly by the Secretary and the project sponsor in any environmental document prepared by the project sponsor in accordance with this subsection and that such document is appropriately supplemented if project changes become necessary.

(5) Adoption and use of documents.--Any environmental document prepared in accordance with this subsection may be adopted or used by any Federal agency making any approval to the same extent that such Federal agency could adopt or use a document prepared by another Federal agency.

(6) Roles and responsibility of lead agency.--With respect to the environmental review process for any project, the lead agency shall have authority and responsibility—

(A) to take such actions as are necessary and proper, within the authority of the lead agency, to facilitate the expeditious resolution of the environmental review process for the project; and

(B) to prepare or ensure that any required environmental impact statement or other document required to be completed under the National Environmental Policy Act of 1969 is completed in accordance with this section and applicable Federal law.

(d) Participating Agencies.—

(1) In general.--The lead agency shall be responsible for inviting and designating participating agencies in accordance with this subsection.

(2) Invitation.--The lead agency shall identify, as early as practicable in the environmental review process for a project, any other Federal and non-Federal agencies that may have an interest in the project, and shall invite such agencies to become participating agencies in the environmental review process for the project. The invitation shall set a deadline for responses to be submitted. The deadline may be extended by the lead agency for good cause.

(3) Federal participating agencies.--Any Federal agency that is invited by the lead agency to participate in the environmental review process for a project shall be designated as a participating agency by the lead agency unless the invited agency informs the lead agency, in writing, by the deadline specified in the invitation that the invited agency—

(A) has no jurisdiction or authority with respect to the project;

(B) has no expertise or information relevant to the project; and

(C) does not intend to submit comments on the project.

(4) Effect of designation.--Designation as a participating agency under this subsection shall not imply that the participating agency—

(A) supports a proposed project; or

(B) has any jurisdiction over, or special expertise with respect to evaluation of, the project.

(5) Cooperating agency.--A participating agency may also be designated by a lead agency as a `cooperating agency' under the regulations contained in part 1500 of title 40, Code of Federal Regulations.

(6) Designations for categories of projects.--The Secretary may exercise the authorities granted under this subsection for a project, class of projects, or program of projects.

(7) Concurrent reviews.--Each Federal agency shall, to the maximum extent practicable--

(A) carry out obligations of the Federal agency under other applicable law concurrently, and in conjunction, with the review required under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), unless doing so would impair the ability of the Federal agency to carry out those obligations; and

(B) formulate and implement administrative, policy, and procedural mechanisms to enable the agency to ensure completion of the environmental

review process in a timely, coordinated, and environmentally responsible manner.

(e) Project Initiation.--The project sponsor shall notify the Secretary of the type of work, termini, length and general location of the proposed project, together with a statement of any Federal approvals anticipated to be necessary for the proposed project, for the purpose of informing the Secretary that the environmental review process should be initiated.

(f) Purpose and Need.--

(1) Participation.--As early as practicable during the environmental review process, the lead agency shall provide an opportunity for involvement by participating agencies and the public in defining the purpose and need for a project.

(2) Definition.--Following participation under paragraph (1), the lead agency shall define the project's purpose and need for purposes of any document which the lead agency is responsible for preparing for the project.

(3) Objectives.--The statement of purpose and need shall include a clear statement of the objectives that the proposed action is intended to achieve, which may include--

(A) achieving a transportation objective identified in an applicable statewide or metropolitan transportation plan;

(B) supporting land use, economic development, or growth objectives established in applicable Federal, State, local, or tribal plans; and

(C) serving national defense, national security, or other national objectives, as established in Federal laws, plans, or policies.

(4) Alternatives analysis.--

(A) Participation.--As early as practicable during the environmental review process, the lead agency shall provide an opportunity for involvement by participating agencies and the public in determining the range of alternatives to be considered for a project.

(B) Range of alternatives.—Following participation under paragraph (1), the lead agency shall determine the range of alternatives for consideration in any document which the lead agency is responsible for preparing for the project.

(C) Methodologies.--The lead agency also shall determine, in collaboration with participating agencies at appropriate times during the study process, the methodologies to be used and the level of detail required in the analysis of each alternative for a project.

(D) Preferred alternative.--At the discretion of the lead agency, the preferred alternative for a project, after being identified, may be developed to a higher level of detail than other alternatives in order to facilitate the development of mitigation measures or concurrent compliance with other applicable laws if the lead agency determines that the development of such higher level of detail will not prevent the lead agency from making an impartial decision as to whether to accept another alternative which is being considered in the environmental review process.

(g) Coordination and Scheduling.--

(1) Coordination plan.--

(A) In general.--The lead agency shall establish a plan for coordinating public and agency participation in and comment on the environmental review process for a project or category of projects. The coordination plan may be incorporated into a memorandum of understanding.

(B) Schedule.--

(i) In general.--The lead agency may establish as part of the coordination plan, after consultation with each participating agency for the project and with the State in which the project is located (and, if the State is not the project sponsor, with the project sponsor), a schedule for completion of the environmental review process for the project.

(ii) Factors for consideration.--In establishing the schedule, the lead agency shall consider factors such as--

(I) the responsibilities of participating agencies under applicable laws;

(II) resources available to the cooperating agencies;

(III) overall size and complexity of the project;

(IV) the overall schedule for and cost of the project; and

(V) the sensitivity of the natural and historic resources that could be affected by the project.

(C) Consistency with other time periods.—A schedule under subparagraph (B) shall be consistent with any other relevant time periods established under Federal law.

(D) Modification.--The lead agency may--

(i) lengthen a schedule established under subparagraph (B) for good cause; and

(ii) shorten a schedule only with the concurrence of the affected cooperating agencies.

(E) Dissemination.--A copy of a schedule under subparagraph (B), and of any modifications to the schedule, shall be—

(i) provided to all participating agencies and to the State transportation department of the State in which the project is located (and, if the State is not the project sponsor, to the project sponsor); and

(ii) made available to the public.

(2) Comment deadlines.--The lead agency shall establish the following deadlines for comment during the environmental review process for a project:

(A) For comments by agencies and the public on a draft environmental impact statement, a period of not more than 60 days after publication in the Federal Register of notice of the date of public availability of such document, unless--

(i) a different deadline is established by agreement of the lead agency, the project sponsor, and all participating agencies; or

(ii) the deadline is extended by the lead agency for good cause.

(B) For all other comment periods established by the lead agency for agency or public comments in the environmental review process, a period of no more than 30 days from availability of the materials on which comment is requested, unless--

(i) a different deadline is established by agreement of the lead agency, the project sponsor, and all participating agencies; or

(ii) the deadline is extended by the lead agency for good cause.

(3) Deadlines for decisions under other laws.--In any case in which a decision under any Federal law relating to a project (including the issuance or denial of a permit or license) is required to be made by the later of the date that is 180 days after the date on which the Secretary made all final decisions of the lead agency with respect to the project, or 180 days after the date on which an application was submitted for the permit or license, the Secretary shall submit to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives—

(A) as soon as practicable after the 180-day period, an initial notice of the failure of the Federal agency to make the decision; and

(B) every 60 days thereafter until such date as all decisions of the Federal agency relating to the project have been made by the Federal agency, an additional notice that describes the number of decisions of the Federal agency that remain outstanding as of the date of the additional notice.

(4) Involvement of the public.--Nothing in this subsection shall reduce any time period provided for public comment in the environmental review process under existing Federal law, including a regulation.

(h) Issue Identification and Resolution.--

(1) Cooperation.--The lead agency and the participating agencies shall work cooperatively in accordance with this section to identify and resolve issues that

could delay completion of the environmental review process or could result in denial of any approvals required for the project under applicable laws.

(2) Lead agency responsibilities.--The lead agency shall make information available to the participating agencies as early as practicable in the environmental review process regarding the environmental and socioeconomic resources located within the project area and the general locations of the alternatives under consideration. Such information may be based on existing data sources, including geographic information systems mapping.

(3) Participating agency responsibilities.--Based on information received from the lead agency, participating agencies shall identify, as early as practicable, any issues of concern regarding the project's potential environmental or socioeconomic impacts. In this paragraph, issues of concern include any issues that could substantially delay or prevent an agency from granting a permit or other approval that is needed for the project.

(4) Issue resolution.--

(A) Meeting of participating agencies.--At any time upon request of a project sponsor or the Governor of a State in which the project is located, the lead agency shall promptly convene a meeting with the relevant participating agencies, the project sponsor, and the Governor (if the meeting was requested by the Governor) to resolve issues that could delay completion of the environmental review process or could result in denial of any approvals required for the project under applicable laws.

(B) Notice that resolution cannot be achieved.--If a resolution cannot be achieved within 30 days following such a meeting and a determination by the lead agency that all information necessary to resolve the issue has been obtained, the lead agency shall notify the heads of all participating agencies, the project sponsor, the Governor, the Committee on Environment and Public Works of the Senate, the Committee on Transportation and Infrastructure of the House of Representatives, and the Council on Environmental Quality, and shall publish such notification in the Federal Register.

(i) Performance Measurement.--The Secretary shall establish a program to measure and report on progress toward improving and expediting the planning and environmental review process.

(j) Assistance to Affected State and Federal Agencies.--

(1) In general.--For a project that is subject to the environmental review process established under this section and for which funds are made available to a State under this title or chapter 53 of title 49, the Secretary may approve a request by the State to provide funds so made available under this title or such chapter 53 to affected Federal agencies (including the Department of Transportation), State agencies, and Indian tribes participating in the environmental review process for the projects in that State or participating in a State process that has been approved by the Secretary for that State. Such funds may be provided only to support activities that directly and meaningfully contribute to expediting and improving transportation project planning and delivery for projects in that State.

(2) Activities eligible for funding.--Activities for which funds may be provided under paragraph (1) include transportation planning activities that precede the initiation of the environmental review process, dedicated staffing, training of agency personnel, information gathering and mapping, and development of programmatic agreements.

(3) Use of federal lands highway funds.--The Secretary may also use funds made available under section 204 for a project for the purposes specified in this subsection with respect to the environmental review process for the project.

(4) Amounts.--Requests under paragraph (1) may be approved only for the additional amounts that the Secretary determines are necessary for the Federal agencies, State agencies, or Indian tribes participating in the environmental review process to meet the time limits for environmental review.

(5) Condition.--A request under paragraph (1) to expedite time limits for environmental review may be approved only if such time limits are less than the customary time necessary for such review.

(k) Judicial Review and Savings Clause.--

(1) Judicial review.--Except as set forth under subsection (l), nothing in this section shall affect the reviewability of any final Federal agency action in a court of the United States or in the court of any State.

(2) Savings clause.--Nothing in this section shall be construed as superseding, amending, or modifying the National Environmental Policy Act of 1969 or any other Federal environmental statute or affect the responsibility of any Federal officer to comply with or enforce any such statute.

(**3) Limitations**.--Nothing in this section shall preempt or interfere with--

(A) any practice of seeking, considering, or responding to public comment; or

(B) any power, jurisdiction, responsibility, or authority that a Federal, State, or local government agency, metropolitan planning organization, Indian tribe, or project sponsor has with respect to carrying out a project or any other provisions of law applicable to projects, plans, or programs.

(l) **Limitations on Claims**.--

(1) In general.--Notwithstanding any other provision of law, a claim arising under Federal law seeking judicial review of a permit, license, or approval issued by a Federal agency for a highway or public transportation capital project shall be barred unless it is filed within 180 days after publication of a notice in the Federal Register announcing that the permit, license, or approval is final pursuant to the law under which the agency action is taken, unless a shorter time is specified in the Federal law pursuant to which judicial review is allowed. Nothing in this subsection shall create a right to judicial review or place any limit on filing a claim that a person has violated the terms of a permit, license, or approval.

(**2) New information**.--The Secretary shall consider new information received after the close of a comment period if the information satisfies the requirements for a supplemental environmental impact statement under section 771.130 of title 23, Code of Federal Regulations. The preparation of a supplemental environmental impact statement when required shall be considered a separate final agency action and the deadline for filing a claim for judicial review of such action shall be 180 days after the date of publication of a notice in the Federal Register announcing such action.

28 U.S.C. § 1291

Title 28. Judiciary and Judicial Procedure
Part IV. Jurisdiction and Venue
Chapter 83. Courts of Appeals

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1292

Title 28. Judiciary and Judicial Decisions
Part IV. Jurisdiction and Venue
Chapter 83. Courts of Appeals

§ 1292. Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: ***Provided, however,*** That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d)(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(2) When the chief judge of the United States Court of Federal Claims issues an order under section 798(b) of this title, or when any judge of the United States Court of Federal Claims, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Court of Federal Claims, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Court of Federal Claims or by the United States Court of Appeals for the Federal Circuit or a judge of that court.

(4)(A) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from an interlocutory order of a district court of the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, granting or denying, in whole or in part, a motion to transfer an action to the United States Court of Federal Claims under section 1631 of this title.

(B) When a motion to transfer an action to the Court of Federal Claims is filed in a district court, no further proceedings shall be taken in the district court until 60 days after the court has ruled upon the motion. If an appeal is taken from the district court's grant or denial of the motion, proceedings shall be further stayed until the appeal has been decided by the Court of Appeals for the Federal Circuit. The stay of proceedings in the district court shall not bar the granting of preliminary or injunctive relief, where appropriate and where expedition is reasonably necessary. However, during the period in which proceedings are stayed as provided in this subparagraph, no transfer to the Court of Federal Claims pursuant to the motion shall be carried out.

(e) The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).

28 U.S.C. § 1331

Title 28. Judiciary and Judicial Procedure
Part IV. Jurisdiction and Venue
Chapter 85. District Courts; Jurisdiction

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1361

Title 28. Judiciary and Judicial Procedure
Part IV. Jurisdiction and Venue
Chapter 85. District Courts; Jurisdiction

§ 1361. Action to compel an officer of the United States to perform his duty

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

49 U.S.C. § 303

Title 49. Transportation
Subtitle I. Department of Transportation
Chapter 3. General Duties and Powers
Subchapter I. Duties of the Secretary of Transportation

§ 303. Policy on lands, wildlife and waterfowl refuges, and historic sites

(a) It is the policy of the United States Government that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.

(b) The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States, in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of lands crossed by transportation activities or facilities.

(c) Approval of programs and projects.--Subject to subsection (d), the Secretary may approve a transportation program or project (other than any project for a park road or parkway under section 204 of title 23) requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) only if--

(1) there is no prudent and feasible alternative to using that land; and

(**2)** the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.

(d) De minimis impacts.--

(1) Requirements.--

(A) Requirements for historic sites.--The requirements of this section shall be considered to be satisfied with respect to an area described in paragraph

(2) if the Secretary determines, in accordance with this subsection, that a transportation program or project will have a de minimis impact on the area.

(B) Requirements for parks, recreation areas, and wildlife or waterfowl refuges.--The requirements of subsection (c)(1) shall be considered to be satisfied with respect to an area described in paragraph (3) if the Secretary determines, in accordance with this subsection, that a transportation program or project will have a de minimis impact on the area. The requirements of subsection (c)(2) with respect to an area described in paragraph (3) shall not include an alternatives analysis.

(C) Criteria.--In making any determination under this subsection, the Secretary shall consider to be part of a transportation program or project any avoidance, minimization, mitigation, or enhancement measures that are required to be implemented as a condition of approval of the transportation program or project.

(2) Historic sites.--With respect to historic sites, the Secretary may make a finding of de minimis impact only if--

(A) the Secretary has determined, in accordance with the consultation process required under section 106 of the National Historic Preservation Act (16 U.S.C. 470f), that--

(i) the transportation program or project will have no adverse effect on the historic site; or

(ii) there will be no historic properties affected by the transportation program or project;

(B) the finding of the Secretary has received written concurrence from the applicable State historic preservation officer or tribal historic preservation officer (and from the Advisory Council on Historic Preservation if the Council is participating in the consultation process); and

(C) the finding of the Secretary has been developed in consultation with parties consulting as part of the process referred to in subparagraph (A).

(3) Parks, recreation areas, and wildlife or waterfowl refuges.--With respect to parks, recreation areas, or wildlife or waterfowl refuges, the Secretary may make a finding of de minimis impact only if--

(A) the Secretary has determined, after public notice and opportunity for public review and comment, that the transportation program or project will not adversely affect the activities, features, and attributes of the park, recreation area, or wildlife or waterfowl refuge eligible for protection under this section; and

(B) the finding of the Secretary has received concurrence from the officials with jurisdiction over the park, recreation area, or wildlife or waterfowl refuge.

49 U.S.C. § 5301
(Pre-2012 Amendment)

Title 49. Transportation
Subtitle III. General and Intermodal Programs
Chapter 53. Public Transportation

§ 5301. Policies, findings and purposes

(a) Development and revitalization of public transportation systems.--It is in the interest of the United States, including its economic interest, to foster the development and revitalization of public transportation systems that--

(1) maximize the safe, secure, and efficient mobility of individuals;

(2) minimize environmental impacts; and

(3) minimize transportation-related fuel consumption and reliance on foreign oil.

(b) General findings.--Congress finds that--

(1) more than two-thirds of the population of the United States is located in rapidly expanding urbanized areas that generally cross the boundary lines of local jurisdictions and often extend into at least 2 States;

(2) the welfare and vitality of urban areas, the satisfactory movement of people and goods within those areas, and the effectiveness of programs aided by the United States Government are jeopardized by deteriorating or inadequate urban transportation service and facilities, the intensification of traffic congestion, and the lack of coordinated, comprehensive, and continuing development planning;

(3) transportation is the lifeblood of an urbanized society, and the health and welfare of an urbanized society depend on providing efficient, economical, and convenient transportation in and between urban areas;

(4) for many years the public transportation industry capably and profitably satisfied the transportation needs of the urban areas of the United States but in the early 1970's continuing even minimal public transportation service in urban

areas was threatened because maintaining that transportation service was financially burdensome;

(5) ending that transportation, or the continued increase in its cost to the user, is undesirable and may affect seriously and adversely the welfare of a substantial number of lower income individuals;

(6) some urban areas were developing preliminary plans for, or carrying out, projects in the early 1970's to revitalize their public transportation operations;

(7) significant public transportation improvements are necessary to achieve national goals for improved air quality, energy conservation, international competitiveness, and mobility for elderly individuals, individuals with disabilities, and economically disadvantaged individuals in urban and rural areas of the United States;

(8) financial assistance by the Government to develop efficient and coordinated public transportation systems is essential to solve the urban transportation problems referred to in clause (2) of this subsection; and

(9) immediate substantial assistance by the Government is needed to enable public transportation systems to continue providing vital transportation service.

(c) Rapid urbanization and continuing population dispersal.--Rapid urbanization and continuing dispersal of the population and activities in urban areas have made the ability of all citizens to move quickly and at a reasonable cost an urgent problem of the Government.

(d) Elderly individuals and individuals with disabilities.--It is the policy of the Government that elderly individuals and individuals with disabilities have the same right as other individuals to use public transportation service and facilities. Special efforts shall be made in planning and designing public transportation service and facilities to ensure that public transportation can be used by elderly individuals and individuals with disabilities. All programs of the Government assisting public transportation shall carry out this policy.

(e) Preserving the environment.--It is the policy of the Government that special effort shall be made to preserve the natural beauty of the countryside, public park and recreation lands, wildlife and waterfowl refuges, and important historical and

cultural assets when planning, designing, and carrying out a public transportation capital project with assistance from the Government.

(f) General purposes.--The purposes of this chapter are--

(1) to assist in developing improved public transportation equipment, facilities, techniques, and methods with the cooperation of both public transportation companies and private companies engaged in public transportation;

(2) to encourage the planning and establishment of areawide public transportation systems needed for economical and desirable urban development with the cooperation of both public transportation companies and private companies engaged in public transportation;

(3) to assist States and local governments and their authorities in financing areawide public transportation systems that are to be operated by public transportation companies or private companies engaged in public transportation as decided by local needs;

(4) to provide financial assistance to State and local governments and their authorities to help carry out national goals related to mobility for elderly individuals, individuals with disabilities, and economically disadvantaged individuals; and

(5) to establish a partnership that allows a community, with financial assistance from the Government, to satisfy its public transportation requirements.

49 U.S.C. § 5302
(Pre-2012 Amendment)

Title 49. Transportation
Subtitle III. General and Intermodal Programs
Chapter 53. Public Transportation

§ 5302. Definitions

(a) In general.--Except as otherwise specifically provided, in this chapter, the following definitions apply:

(1) Capital project.--The term 'capital project' means a project for--

(A) acquiring, constructing, supervising, or inspecting equipment or a facility for use in public transportation, expenses incidental to the acquisition or construction (including designing, engineering, location surveying, mapping, and acquiring rights-of-way), payments for the capital portions of rail trackage rights agreements, transit-related intelligent transportation systems, relocation assistance, acquiring replacement housing sites, and acquiring, constructing, relocating, and rehabilitating replacement housing;

(B) rehabilitating a bus;

(C) remanufacturing a bus;

(D) overhauling rail rolling stock;

(E) preventive maintenance;

(F) leasing equipment or a facility for use in public transportation, subject to regulations that the Secretary prescribes limiting the leasing arrangements to those that are more cost-effective than purchase or construction;

(G) a public transportation improvement that enhances economic development or incorporates private investment, including commercial and residential development, pedestrian and bicycle access to a public transportation facility, construction, renovation, and improvement of intercity bus and intercity rail stations and terminals, and the renovation and improvement of historic transportation facilities, because the improvement

enhances the effectiveness of a public transportation project and is related physically or functionally to that public transportation project, or establishes new or enhanced coordination between public transportation and other transportation, and provides a fair share of revenue for public transportation that will be used for public transportation--

(i) including property acquisition, demolition of existing structures, site preparation, utilities, building foundations, walkways, open space, safety and security equipment and facilities (including lighting, surveillance and related intelligent transportation system applications), facilities that incorporate community services such as daycare or health care, and a capital project for, and improving, equipment or a facility for an intermodal transfer facility or transportation mall, except that a person making an agreement to occupy space in a facility under this subparagraph shall pay a reasonable share of the costs of the facility through rental payments and other means; and

(ii) excluding construction of a commercial revenue-producing facility (other than an intercity bus station or terminal) or a part of a public facility not related to public transportation;

(H) the introduction of new technology, through innovative and improved products, into public transportation;

(I) the provision of nonfixed route paratransit transportation services in accordance with section 223 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12143), but only for grant recipients that are in compliance with applicable requirements of that Act, including both fixed route and demand responsive service, and only for amounts not to exceed 10 percent of such recipient's annual formula apportionment under sections 5307 and 5311;

(J) crime prevention and security--

(i) including--

(I) projects to refine and develop security and emergency response plans;

(II) projects aimed at detecting chemical and biological agents in public transportation;

(III) the conduct of emergency response drills with public transportation agencies and local first response agencies; and

(IV) security training for public transportation employees; but

(ii) excluding all expenses related to operations, other than such expenses incurred in conducting activities described in clauses (i)(III) and (i)(IV);

(K) establishing a debt service reserve, made up of deposits with a bondholder's trustee, to ensure the timely payment of principal and interest on bonds issued by a grant recipient to finance an eligible project under this chapter; or

(L) mobility management--

(i) consisting of short-range planning and management activities and projects for improving coordination among public transportation and other transportation service providers carried out by a recipient or subrecipient through an agreement entered into with a person, including a governmental entity, under this chapter (other than section 5309); but

(ii) excluding operating public transportation services.

(2) Chief executive officer of a state.--The term ‘chief executive officer of a State’ includes the designee of the chief executive officer.

(3) Emergency regulation.--The term ‘emergency regulation’ means a regulation--

(A) that is effective temporarily before the expiration of the otherwise specified periods of time for public notice and comment under section 5334(b); and

(B) prescribed by the Secretary as the result of a finding that a delay in the effective date of the regulation--

(i) would injure seriously an important public interest;

(ii) would frustrate substantially legislative policy and intent; or

(iii) would damage seriously a person or class without serving an important public interest.

(4) Fixed guideway.--The term 'fixed guideway' means a public transportation facility--

(A) using and occupying a separate right-of-way or rail for the exclusive use of public transportation and other high occupancy vehicles; or

(B) using a fixed catenary system and a right-of-way usable by other forms of transportation.

(5) Individual with a disability.--The term 'individual with a disability' means an individual who, because of illness, injury, age, congenital malfunction, or other incapacity or temporary or permanent disability (including an individual who is a wheelchair user or has semiambulatory capability), cannot use effectively, without special facilities, planning, or design, public transportation service or a public transportation facility.

(6) Local governmental authority.--The term 'local governmental authority' includes--

(A) a political subdivision of a State;

(B) an authority of at least 1 State or political subdivision of a State;

(C) an Indian tribe; and

(D) a public corporation, board, or commission established under the laws of a State.

(7) Mass transportation.--The term 'mass transportation' means public transportation.

(8) Net project cost.--The term 'net project cost' means the part of a project that reasonably cannot be financed from revenues.

(9) New bus model.--The term 'new bus model' means a bus model (including a model using alternative fuel)--

(A) that has not been used in public transportation in the United States before the date of production of the model; or

(B) used in public transportation in the United States, but being produced with a major change in configuration or components.

(10) Public transportation.--The term 'public transportation' means transportation by a conveyance that provides regular and continuing general or special transportation to the public, but does not include schoolbus, charter, sightseeing, or intercity bus transportation or intercity passenger rail transportation provided by the entity described in chapter 243 (or a successor to such entity).

(11) Regulation.--The term 'regulation' means any part of a statement of general or particular applicability of the Secretary designed to carry out, interpret, or prescribe law or policy in carrying out this chapter.

(12) Secretary.--The term 'Secretary' means the Secretary of Transportation.

(13) State.--The term 'State' means a State of the United States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, Guam, American Samoa, and the Virgin Islands.

(14) Transit.--The term 'transit' means public transportation.

(15) Transit enhancement.--The term 'transit enhancement' means, with respect to any project or an area to be served by a project, projects that are designed to enhance public transportation service or use and that are physically or functionally related to transit facilities. Eligible projects are--

(A) historic preservation, rehabilitation, and operation of historic public transportation buildings, structures, and facilities (including historic bus and railroad facilities);

(B) bus shelters;

(C) landscaping and other scenic beautification, including tables, benches, trash receptacles, and street lights;

(D) public art;

(E) pedestrian access and walkways;

(F) bicycle access, including bicycle storage facilities and installing equipment for transporting bicycles on public transportation vehicles;

(G) transit connections to parks within the recipient's transit service area;

(H) signage; and

(I) enhanced access for persons with disabilities to public transportation.

(16) Urban area.--The term ‘urban area’ means an area that includes a municipality or other built-up place that the Secretary, after considering local patterns and trends of urban growth, decides is appropriate for a local public transportation system to serve individuals in the locality.

(17) Urbanized area.--The term ‘urbanized area’ means an area encompassing a population of not less than 50,000 people that has been defined and designated in the most recent decennial census as an ‘urbanized area’ by the Secretary of Commerce.

(b) Authority to modify ‘individual with a disability’.--The Secretary may by regulation modify the definition of the term ‘individual with a disability’ in subsection (a)(5) as it applies to section 5307(d)(1)(D).

49 U.S.C. § 5303

Title 49. Transportation
Subtitle III. General and Intermodal Programs
Chapter 53. Public Transportation

§ 5303. Metropolitan transportation planning

(a) Policy.--It is in the national interest to--

(1) encourage and promote the safe and efficient management, operation, and development of surface transportation systems that will serve the mobility needs of people and freight and foster economic growth and development within and between States and urbanized areas, while minimizing transportation-related fuel consumption and air pollution through metropolitan and statewide transportation planning processes identified in this chapter; and

(2) encourage the continued improvement and evolution of the metropolitan and statewide transportation planning processes by metropolitan planning organizations, State departments of transportation, and public transit operators as guided by the planning factors identified in subsection (h) and section 5304(d).

(b) Definitions.--In this section and section 5304, the following definitions apply:

(1) Metropolitan planning area.--The term 'metropolitan planning area' means the geographic area determined by agreement between the metropolitan planning organization for the area and the Governor under subsection (e).

(2) Metropolitan planning organization.--The term 'metropolitan planning organization' means the policy board of an organization created as a result of the designation process in subsection (d).

(3) Nonmetropolitan area.--The term 'nonmetropolitan area' means a geographic area outside a designated metropolitan planning area.

(4) Nonmetropolitan local official.--The term 'nonmetropolitan local official' means elected and appointed officials of general purpose local government in a nonmetropolitan area with responsibility for transportation.

(5) TIP.--The term 'TIP' means a transportation improvement program developed by a metropolitan planning organization under subsection (j).

(6) Urbanized area.--The term 'urbanized area' means a geographic area with a population of 50,000 or more, as designated by the Bureau of the Census.

(c) General requirements.--

(1) Development of long-range plans and tips.--To accomplish the objectives in subsection (a), metropolitan planning organizations designated under subsection (d), in cooperation with the State and public transportation operators, shall develop long-range transportation plans and transportation improvement programs for metropolitan planning areas of the State.

(2) Contents.--The plans and TIPs for each metropolitan area shall provide for the development and integrated management and operation of transportation systems and facilities (including accessible pedestrian walkways and bicycle transportation facilities) that will function as an intermodal transportation system for the metropolitan planning area and as an integral part of an intermodal transportation system for the State and the United States.

(3) Process of development.--The process for developing the plans and TIPs shall provide for consideration of all modes of transportation and shall be continuing, cooperative, and comprehensive to the degree appropriate, based on the complexity of the transportation problems to be addressed.

(d) Designation of metropolitan planning organizations.--

(1) In general.--To carry out the transportation planning process required by this section, a metropolitan planning organization shall be designated for each urbanized area with a population of more than 50,000 individuals--

(A) by agreement between the Governor and units of general purpose local government that together represent at least 75 percent of the affected population (including the largest incorporated city (based on population) as named by the Bureau of the Census); or

(B) in accordance with procedures established by applicable State or local law.

(2) Structure.--Each metropolitan planning organization that serves an area designated as a transportation management area, when designated or redesignated under this subsection, shall consist of--

(A) local elected officials;

(B) officials of public agencies that administer or operate major modes of transportation in the metropolitan area; and

(C) appropriate State officials.

(3) Limitation on statutory construction.--Nothing in this subsection shall be construed to interfere with the authority, under any State law in effect on December 18, 1991, of a public agency with multimodal transportation responsibilities to--

(A) develop the plans and TIPs for adoption by a metropolitan planning organization; and

(B) develop long-range capital plans, coordinate transit services and projects, and carry out other activities pursuant to State law.

(4) Continuing designation.--A designation of a metropolitan planning organization under this subsection or any other provision of law shall remain in effect until the metropolitan planning organization is redesignated under paragraph (5).

(5) Redesignation procedures.--A metropolitan planning organization may be redesignated by agreement between the Governor and units of general purpose local government that together represent at least 75 percent of the existing planning area population (including the largest incorporated city (based on population) as named by the Bureau of the Census) as appropriate to carry out this section.

(6) Designation of more than one metropolitan planning organization.--More than one metropolitan planning organization may be designated within an existing metropolitan planning area only if the Governor and the existing metropolitan planning organization determine that the size and complexity of the existing metropolitan planning area make designation of more than one metropolitan planning organization for the area appropriate.

(e) Metropolitan planning area boundaries.--

(1) In general.--For the purposes of this section, the boundaries of a metropolitan planning area shall be determined by agreement between the metropolitan planning organization and the Governor.

(2) Included area.--Each metropolitan planning area--

(A) shall encompass at least the existing urbanized area and the contiguous area expected to become urbanized within a 20-year forecast period for the transportation plan; and
(B) may encompass the entire metropolitan statistical area or consolidated metropolitan statistical area, as defined by the Bureau of the Census.

(3) Identification of new urbanized areas within existing planning area boundaries.--The designation by the Bureau of the Census of new urbanized areas within an existing metropolitan planning area shall not require the redesignation of the existing metropolitan planning organization.

(4) Existing metropolitan planning areas in nonattainment.--Notwithstanding paragraph (2), in the case of an urbanized area designated as a nonattainment area for ozone or carbon monoxide under the Clean Air Act (42 U.S.C. 7401 et seq.) as of the date of enactment of the Federal Public Transportation Act of 2005, the boundaries of the metropolitan planning area in existence as of such date of enactment shall be retained; except that the boundaries may be adjusted by agreement of the Governor and affected metropolitan planning organizations in the manner described in subsection (d)(5).

(5) New metropolitan planning areas in nonattainment.--In the case of an urbanized area designated after the date of enactment of the Federal Public Transportation Act of 2005 as a nonattainment area for ozone or carbon monoxide, the boundaries of the metropolitan planning area--

(A) shall be established in the manner described in subsection (d)(1);

(B) shall encompass the areas described in paragraph (2)(A);

(C) may encompass the areas described in paragraph (2)(B) ; and

(D) may address any nonattainment area identified under the Clean Air Act for ozone or carbon monoxide.

(f) Coordination in multistate areas.--

(1) In general.--The Secretary shall encourage each Governor with responsibility for a portion of a multistate metropolitan area and the appropriate metropolitan planning organizations to provide coordinated transportation planning for the entire metropolitan area.

(2) Interstate compacts.--The consent of Congress is granted to any two or more States--

(A) to enter into agreements or compacts, not in conflict with any law of the United States, for cooperative efforts and mutual assistance in support of activities authorized under this section as the activities pertain to interstate areas and localities within the States; and

(B) to establish such agencies, joint or otherwise, as the States may determine desirable for making the agreements and compacts effective.

(3) Lake Tahoe region.--

(A) Definition.--In this paragraph, the term 'Lake Tahoe region' has the meaning given the term 'region' in subdivision (a) of article II of the Tahoe Regional Planning Compact, as set forth in the first section of Public Law 96-551 (94 Stat. 3234).

(B) Transportation planning process.--The Secretary shall--

(i) establish with the Federal land management agencies that have jurisdiction over land in the Lake Tahoe region a transportation planning process for the region; and

(ii) coordinate the transportation planning process with the planning process required of State and local governments under this section and section 5304.

(C) Interstate compact.--

(i) In general.--Subject to clause (ii), and notwithstanding subsection (b), to carry out the transportation planning process required by this section, the consent of Congress is granted to the States of California and Nevada to designate a metropolitan planning organization for the Lake Tahoe region, by agreement between the Governors of the States of California and Nevada and units of general purpose local government that together represent at least 75 percent of the affected population (including the central city or cities (as defined by the Bureau of the Census)), or in accordance with procedures established by applicable State or local law.

(ii) Involvement of Federal land management agencies.--

(I) Representation.--The policy board of a metropolitan planning organization designated under clause (i) shall include a representative of each Federal land management agency that has jurisdiction over land in the Lake Tahoe region.

(II) Funding.--For fiscal year 2008 and each fiscal year thereafter, in addition to other funds made available to the metropolitan planning organization for the Lake Tahoe region under this chapter and title 23, prior to any allocation under section 202 of title 23, and notwithstanding the allocation provisions of section 202, the Secretary shall set aside 1/2 of 1 percent of all funds authorized to be appropriated for such fiscal year to carry out section 204 of title 23, and shall make such funds available to the metropolitan planning organization for the Lake Tahoe region to carry out the transportation planning process, environmental reviews, preliminary engineering, and design to complete environmental documentation for transportation projects for the Lake Tahoe region under the Tahoe Regional Planning Compact as consented to in Public Law 96-551 (94 Stat. 3233) and this paragraph.

(D) Activities.--Highway projects included in transportation plans developed under this paragraph--

(i) shall be selected for funding in a manner that facilitates the participation of the Federal land management agencies that have jurisdiction over land in the Lake Tahoe region; and

(ii) may, in accordance with chapter 2 of title 23, be funded using funds allocated under section 202 of such title.

(4) Reservation of rights.--The right to alter, amend, or repeal interstate compacts entered into under this subsection is expressly reserved.

(g) MPO Consultation in Plan and TIP Coordination--

(1) Nonattainment areas.--If more than one metropolitan planning organization has authority within a metropolitan area or an area which is designated as a nonattainment area for ozone or carbon monoxide under the Clean Air Act, each metropolitan planning organization shall consult with the other metropolitan planning organizations designated for such area and the State in the coordination of plans and TIPs required by this section.

(2) Transportation improvements located in multiple MPOs.--If a transportation improvement, funded from the Highway Trust Fund or authorized under this chapter, is located within the boundaries of more than one metropolitan planning area, the metropolitan planning organizations shall coordinate plans and TIPs regarding the transportation improvement.

(3) Relationship with other planning officials.--The Secretary shall encourage each metropolitan planning organization to consult with officials responsible for other types of planning activities that are affected by transportation in the area (including State and local planned growth, economic development, environmental protection, airport operations, and freight movements) or to coordinate its planning process, to the maximum extent practicable, with such planning activities. Under the metropolitan planning process, transportation plans and TIPs shall be developed with due consideration of other related planning activities within the metropolitan area, and the process shall provide for the design and delivery of transportation services within the metropolitan area that are provided by--

(A) recipients of assistance under this chapter;

(B) governmental agencies and nonprofit organizations (including representatives of the agencies and organizations) that receive Federal assistance from a source other than the Department of Transportation to provide nonemergency transportation services; and

(C) recipients of assistance under section 204 of title 23.

(h) Scope of planning process.--

(1) In general.--The metropolitan planning process for a metropolitan planning area under this section shall provide for consideration of projects and strategies that will--

(A) support the economic vitality of the metropolitan area, especially by enabling global competitiveness, productivity, and efficiency;

(B) increase the safety of the transportation system for motorized and nonmotorized users;

(C) increase the security of the transportation system for motorized and nonmotorized users;

(D) increase the accessibility and mobility of people and for freight;

(E) protect and enhance the environment, promote energy conservation, improve the quality of life, and promote consistency between transportation improvements and State and local planned growth and economic development patterns;

(F) enhance the integration and connectivity of the transportation system, across and between modes, for people and freight;

(G) promote efficient system management and operation; and

(H) emphasize the preservation of the existing transportation system.

(2) Failure to consider factors.--The failure to consider any factor specified in paragraph (1) shall not be reviewable by any court under this chapter, title 23, subchapter II of chapter 5 of title 5, or chapter 7 of title 5 in any matter affecting a transportation plan, a TIP, a project or strategy, or the certification of a planning process.

(i) Development of transportation plan.--

(1) In general.--Each metropolitan planning organization shall prepare a transportation plan for its metropolitan planning area in accordance with the requirements of this subsection. The metropolitan planning organization shall prepare and update such plan every 4 years (or more frequently, if the metropolitan planning organization elects to update more frequently) in the case of each of the following:

(A) Any area designated as nonattainment, as defined in section 107(d) of the Clean Air Act (42 U.S.C. 7407(d)).

(B) Any area that was nonattainment and subsequently designated to attainment in accordance with section 107(d)(3) of that Act (42 U.S.C. 7407(d)(3)) and that is subject to a maintenance plan under section 175A of that Act (42 U.S.C. 7505a).

In the case of any other area required to have a transportation plan in accordance with the requirements of this subsection, the metropolitan planning organization shall prepare and update such plan every 5 years unless the metropolitan planning organization elects to update more frequently.

(2) Transportation plan.--A transportation plan under this section shall be in a form that the Secretary determines to be appropriate and shall contain, at a minimum, the following:

(A) Identification of transportation facilities.--An identification of transportation facilities (including major roadways, transit, multimodal and intermodal facilities, and intermodal connectors) that should function as an integrated metropolitan transportation system, giving emphasis to those facilities that serve important national and regional transportation functions. In formulating the transportation plan, the metropolitan planning organization shall consider factors described in subsection (h) as such factors relate to a 20-year forecast period.

(B) Mitigation activities.--

(i) In general.--A long-range transportation plan shall include a discussion of types of potential environmental mitigation activities and potential areas to carry out these activities, including activities

that may have the greatest potential to restore and maintain the environmental functions affected by the plan.

(ii) Consultation.--The discussion shall be developed in consultation with Federal, State, and tribal wildlife, land management, and regulatory agencies.

(C) Financial plan.--A financial plan that demonstrates how the adopted transportation plan can be implemented, indicates resources from public and private sources that are reasonably expected to be made available to carry out the plan, and recommends any additional financing strategies for needed projects and programs. The financial plan may include, for illustrative purposes, additional projects that would be included in the adopted transportation plan if reasonable additional resources beyond those identified in the financial plan were available. For the purpose of developing the transportation plan, the metropolitan planning organization, transit operator, and State shall cooperatively develop estimates of funds that will be available to support plan implementation.

(D) Operational and management strategies.--Operational and management strategies to improve the performance of existing transportation facilities to relieve vehicular congestion and maximize the safety and mobility of people and goods.

(E) Capital investment and other strategies.--Capital investment and other strategies to preserve the existing and projected future metropolitan transportation infrastructure and provide for multimodal capacity increases based on regional priorities and needs.

(F) Transportation and transit enhancement activities.--Proposed transportation and transit enhancement activities.

(3) Coordination with Clean Air Act agencies.--In metropolitan areas which are in nonattainment for ozone or carbon monoxide under the Clean Air Act, the metropolitan planning organization shall coordinate the development of a transportation plan with the process for development of the transportation control measures of the State implementation plan required by the Clean Air Act.

(4) Consultation.--

(A) In general.--In each metropolitan area, the metropolitan planning organization shall consult, as appropriate, with State and local agencies responsible for land use management, natural resources, environmental protection, conservation, and historic preservation concerning the development of a long-range transportation plan.

(B) Issues.--The consultation shall involve, as appropriate--

(i) comparison of transportation plans with State conservation plans or maps, if available; or

(ii) comparison of transportation plans to inventories of natural or historic resources, if available.

(5) Participation by interested parties.--

(A) In general.--Each metropolitan planning organization shall provide citizens, affected public agencies, representatives of public transportation employees, freight shippers, providers of freight transportation services, private providers of transportation, representatives of users of public transportation, representatives of users of pedestrian walkways and bicycle transportation facilities, representatives of the disabled, and other interested parties with a reasonable opportunity to comment on the transportation plan.

(B) Contents of participation plan.--A participation plan--

(i) shall be developed in consultation with all interested parties; and

(ii) shall provide that all interested parties have reasonable opportunities to comment on the contents of the transportation plan.

(C) Methods.--In carrying out subparagraph (A), the metropolitan planning organization shall, to the maximum extent practicable--

(i) hold any public meetings at convenient and accessible locations and times;

(ii) employ visualization techniques to describe plans; and

(iii) make public information available in electronically accessible format and means, such as the World Wide Web, as appropriate to afford reasonable opportunity for consideration of public information under subparagraph (A).

(6) Publication.--A transportation plan involving Federal participation shall be published or otherwise made readily available by the metropolitan planning organization for public review, including (to the maximum extent practicable) in electronically accessible formats and means, such as the World Wide Web, approved by the metropolitan planning organization and submitted for information purposes to the Governor at such times and in such manner as the Secretary shall establish.

(7) Selection of projects from illustrative list.--Notwithstanding paragraph (2)(C), a State or metropolitan planning organization shall not be required to select any project from the illustrative list of additional projects included in the financial plan under paragraph (2)(C).

(j) Metropolitan tip.--

(1) Development.--

(A) In general.--In cooperation with the State and any affected public transportation operator, the metropolitan planning organization designated for a metropolitan area shall develop a TIP for the area for which the organization is designated.

(B) Opportunity for comment.--In developing the TIP, the metropolitan planning organization, in cooperation with the State and any affected public transportation operator, shall provide an opportunity for participation by interested parties in the development of the program, in accordance with subsection (i)(5).

(C) Funding estimates.--For the purpose of developing the TIP, the metropolitan planning organization, public transportation agency, and State shall cooperatively develop estimates of funds that are reasonably expected to be available to support program implementation.

(D) Updating and approval.--The TIP shall be updated at least once every 4 years and shall be approved by the metropolitan planning organization and the Governor.

(2) Contents.--

(A) Priority list.--The TIP shall include a priority list of proposed federally supported projects and strategies to be carried out within each 4-year period after the initial adoption of the TIP.

(B) Financial plan.--The TIP shall include a financial plan that--

(i) demonstrates how the TIP can be implemented;

(ii) indicates resources from public and private sources that are reasonably expected to be available to carry out the program;

(iii) identifies innovative financing techniques to finance projects, programs, and strategies; and

(iv) may include, for illustrative purposes, additional projects that would be included in the approved TIP if reasonable additional resources beyond those identified in the financial plan were available.

(C) Descriptions.--Each project in the TIP shall include sufficient descriptive material (such as type of work, termini, length, and other similar factors) to identify the project or phase of the project.

(3) Included projects.--

(A) Projects under this chapter and title 23.--A TIP developed under this subsection for a metropolitan area shall include the projects within the area that are proposed for funding under this chapter and chapter 1 of title 23.

(B) Projects under chapter 2 of title 23.--

(i) Regionally significant projects.--Regionally significant projects proposed for funding under chapter 2 of title 23 shall be identified individually in the transportation improvement program.

(ii) Other projects.--Projects proposed for funding under chapter 2 of title 23 that are not determined to be regionally significant shall be grouped in one line item or identified individually in the transportation improvement program.

(C) Consistency with long-range transportation plan.--Each project shall be consistent with the long-range transportation plan developed under subsection (i) for the area.

(D) Requirement of anticipated full funding.--The program shall include a project, or an identified phase of a project, only if full funding can reasonably be anticipated to be available for the project or the identified phase within the time period contemplated for completion of the project or the identified phase.

(4) Notice and comment.--Before approving a TIP, a metropolitan planning organization, in cooperation with the State and any affected public transportation operator, shall provide an opportunity for participation by interested parties in the development of the program, in accordance with subsection (i)(5).

(5) Selection of projects.--

(A) In general.--Except as otherwise provided in subsection (k)(4) and in addition to the TIP development required under paragraph (1), the selection of federally funded projects in metropolitan areas shall be carried out, from the approved TIP--

(i) by--

(I) in the case of projects under title 23, the State; and

(II) in the case of projects under this chapter, the designated recipients of public transportation funding; and

(ii) in cooperation with the metropolitan planning organization.

(B) Modifications to project priority.--Notwithstanding any other provision of law, action by the Secretary shall not be required to advance a

project included in the approved TIP in place of another project in the program.

(6) Selection of projects from illustrative list.--

(A) No required selection.--Notwithstanding paragraph (2)(B)(iv), a State or metropolitan planning organization shall not be required to select any project from the illustrative list of additional projects included in the financial plan under paragraph (2)(B)(iv).

(B) Required action by the Secretary.--Action by the Secretary shall be required for a State or metropolitan planning organization to select any project from the illustrative list of additional projects included in the financial plan under paragraph (2)(B)(iv) for inclusion in an approved TIP.

(7) Publication.--

(A) Publication of tips.--A TIP involving Federal participation shall be published or otherwise made readily available by the metropolitan planning organization for public review.

(B) Publication of annual listings of projects.--An annual listing of projects, including investments in pedestrian walkways and bicycle transportation facilities, for which Federal funds have been obligated in the preceding year shall be published or otherwise made available by the cooperative effort of the State, transit operator, and metropolitan planning organization for public review. The listing shall be consistent with the categories identified in the TIP.

(C) Rulemaking.--Not later than 180 days after the date of enactment of the Federal Public Transportation Act of 2005, the Secretary shall issue regulations setting standards for the listing required by subparagraph (B) and specifying the types of data to be included in such list, including sufficient information about each project to identify its type, location, and amount obligated.

(k) Transportation management areas.--

(1) Identification and designation.--

(A) Required identification.--The Secretary shall identify as a transportation management area each urbanized area (as defined by the Bureau of the Census) with a population of over 200,000 individuals.

(B) Designations on request.--The Secretary shall designate any additional area as a transportation management area on the request of the Governor and the metropolitan planning organization designated for the area.

(2) Transportation plans.--In a transportation management area, transportation plans shall be based on a continuing and comprehensive transportation planning process carried out by the metropolitan planning organization in cooperation with the State and public transportation operators.

(3) Congestion management process.--Within a metropolitan planning area serving a transportation management area, the transportation planning process under this section shall address congestion management through a process that provides for effective management and operation, based on a cooperatively developed and implemented metropolitan-wide strategy, of new and existing transportation facilities eligible for funding under this chapter and title 23 through the use of travel demand reduction and operational management strategies. The Secretary shall establish an appropriate phase-in schedule for compliance with the requirements of this section but no sooner than one year after the identification of a transportation management area.

(4) Selection of projects.--

(A) In general.--All federally funded projects carried out within the boundaries of a metropolitan planning area serving a transportation management area under title 23 (excluding projects carried out on the National Highway System and projects carried out under the bridge program or the Interstate maintenance program) or under this chapter shall be selected for implementation from the approved TIP by the metropolitan planning organization designated for the area in consultation with the State and any affected public transportation operator.

(B) National highway system projects.--Projects carried out within the boundaries of a metropolitan planning area serving a transportation management area on the National Highway System and projects carried out within such boundaries under the bridge program or the Interstate maintenance program under title 23 shall be selected for implementation

from the approved TIP by the State in cooperation with the metropolitan planning organization designated for the area.

(5) Certification.--

(A) In general.--The Secretary shall--

(i) ensure that the metropolitan planning process of a metropolitan planning organization serving a transportation management area is being carried out in accordance with applicable provisions of Federal law; and

(ii) subject to subparagraph (B), certify, not less often than once every 4 years, that the requirements of this paragraph are met with respect to the metropolitan planning process.

(B) Requirements for certification.--The Secretary may make the certification under subparagraph (A) if--

(i) the transportation planning process complies with the requirements of this section and other applicable requirements of Federal law; and

(ii) there is a TIP for the metropolitan planning area that has been approved by the metropolitan planning organization and the Governor.

(C) Effect of failure to certify.--

(i) Withholding of project funds.--If a metropolitan planning process of a metropolitan planning organization serving a transportation management area is not certified, the Secretary may withhold up to 20 percent of the funds attributable to the metropolitan planning area of the metropolitan planning organization for projects funded under this chapter and title 23.

(ii) Restoration of withheld funds.--The withheld funds shall be restored to the metropolitan planning area at such time as the metropolitan planning process is certified by the Secretary.

(D) Review of certification.--In making certification determinations under this paragraph, the Secretary shall provide for public involvement appropriate to the metropolitan area under review.

(l) Abbreviated plans for certain areas.--

(1) In general.--Subject to paragraph (2), in the case of a metropolitan area not designated as a transportation management area under this section, the Secretary may provide for the development of an abbreviated transportation plan and TIP for the metropolitan planning area that the Secretary determines is appropriate to achieve the purposes of this section, taking into account the complexity of transportation problems in the area.

(2) Nonattainment areas.--The Secretary may not permit abbreviated plans or TIPs for a metropolitan area that is in nonattainment for ozone or carbon monoxide under the Clean Air Act.

(m) Additional requirements for certain nonattainment areas.--

(1) In general.--Notwithstanding any other provisions of this chapter or title 23, for transportation management areas classified as nonattainment for ozone or carbon monoxide pursuant to the Clean Air Act, Federal funds may not be advanced in such area for any highway project that will result in a significant increase in the carrying capacity for single-occupant vehicles unless the project is addressed through a congestion management process.

(**2) Applicability.**--This subsection applies to a nonattainment area within the metropolitan planning area boundaries determined under subsection (e).

(n) Limitation on statutory construction.--Nothing in this section shall be construed to confer on a metropolitan planning organization the authority to impose legal requirements on any transportation facility, provider, or project not eligible under this chapter or title 23.

(o) Funding.--Funds set aside under section 5305(g) of this title or section 104(f) of title 23 shall be available to carry out this section.

(p) Continuation of current review practice.--Since plans and TIPs described in this section are subject to a reasonable opportunity for public comment, since individual projects included in plans and TIPs are subject to review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), and since decisions by the Secretary concerning plans and TIPs described in this section have not been reviewed under such Act as of January 1, 1997, any decision by the

Secretary concerning a plan or TIP described in this section shall not be considered to be a Federal action subject to review under such Act.

49 U.S.C. § 5304

Title 49. Transportation
Subtitle III. General and Intermodal Programs
Chapter 53. Public Transportation

§ 5304. Statewide and nonmetropolitan transportation planning

(a) General requirements.--

(1) Development of plans and programs.--To accomplish the objectives stated in section 5303(a), each State shall develop a statewide transportation plan and a statewide transportation improvement program for all areas of the State, subject to section 5303.

(2) Contents.--The statewide transportation plan and the transportation improvement program developed for each State shall provide for the development and integrated management and operation of transportation systems and facilities (including accessible pedestrian walkways and bicycle transportation facilities) that will function as an intermodal transportation system for the State and an integral part of an intermodal transportation system for the United States.

(3) Process of development.--The process for developing the statewide plan and the transportation improvement program shall provide for consideration of all modes of transportation and the policies stated in section 5303(a), and shall be continuing, cooperative, and comprehensive to the degree appropriate, based on the complexity of the transportation problems to be addressed.

(b) Coordination with metropolitan planning; State implementation plan.--A State shall--

(1) coordinate planning carried out under this section with the transportation planning activities carried out under section 5303 for metropolitan areas of the State and with statewide trade and economic development planning activities and related multistate planning efforts; and

(2) develop the transportation portion of the State implementation plan as required by the Clean Air Act (42 U.S.C. 7401 et seq.).

(c) Interstate agreements.--

(1) In general.--The consent of Congress is granted to 2 or more States entering into agreements or compacts, not in conflict with any law of the United States, for cooperative efforts and mutual assistance in support of activities authorized under this section related to interstate areas and localities in the States and establishing authorities the States consider desirable for making the agreements and compacts effective.

(2) Reservation of rights.--The right to alter, amend, or repeal interstate compacts entered into under this subsection is expressly reserved.

(d) Scope of planning process.--

(1) In general.--Each State shall carry out a statewide transportation planning process that provides for consideration and implementation of projects, strategies, and services that will--

(A) support the economic vitality of the United States, the States, nonmetropolitan areas, and metropolitan areas, especially by enabling global competitiveness, productivity, and efficiency;

(B) increase the safety of the transportation system for motorized and nonmotorized users;

(C) increase the security of the transportation system for motorized and nonmotorized users;

(D) increase the accessibility and mobility of people and freight;

(E) protect and enhance the environment, promote energy conservation, improve the quality of life, and promote consistency between transportation improvements and State and local planned growth and economic development patterns;

(F) enhance the integration and connectivity of the transportation system, across and between modes throughout the State, for people and freight;

(G) promote efficient system management and operation; and

(H) emphasize the preservation of the existing transportation system.

(2) Failure to consider factors.--The failure to consider any factor specified in paragraph (1) shall not be reviewable by any court under this chapter, title 23, subchapter II of chapter 5 of title 5, or chapter 7 of title 5 in any matter affecting a statewide transportation plan, the transportation improvement program, a project or strategy, or the certification of a planning process.

(e) Additional requirements.--In carrying out planning under this section, each State shall consider, at a minimum--

(1) with respect to nonmetropolitan areas, the concerns of affected local officials with responsibility for transportation;

(2) the concerns of Indian tribal governments and Federal land management agencies that have jurisdiction over land within the boundaries of the State; and

(3) coordination of transportation plans, the transportation improvement program, and planning activities with related planning activities being carried out outside of metropolitan planning areas and between States.

(f) Long-range statewide transportation plan.--

(1) Development.--Each State shall develop a long-range statewide transportation plan, with a minimum 20-year forecast period for all areas of the State, that provides for the development and implementation of the intermodal transportation system of the State.

(2) Consultation with Governments.--

(A) Metropolitan areas.--The statewide transportation plan shall be developed for each metropolitan area in the State in cooperation with the metropolitan planning organization designated for the metropolitan area under section 5303.

(B) Nonmetropolitan areas.--With respect to nonmetropolitan areas, the statewide transportation plan shall be developed in consultation with affected nonmetropolitan officials with responsibility for transportation. The Secretary shall not review or approve the consultation process in each State.

(C) Indian tribal areas.--With respect to each area of the State under the jurisdiction of an Indian tribal government, the statewide transportation plan shall be developed in consultation with the tribal government and the Secretary of the Interior.

(D) Consultation, comparison, and consideration.--

(i) In general.--The long-range transportation plan shall be developed, as appropriate, in consultation with State, tribal, and local agencies responsible for land use management, natural resources, environmental protection, conservation, and historic preservation.

(ii) Comparison and consideration.--Consultation under clause (i) shall involve comparison of transportation plans to State and tribal conservation plans or maps, if available, and comparison of transportation plans to inventories of natural or historic resources, if available.

(3) Participation by interested parties.--

(A) In general.--In developing the statewide transportation plan, the State shall provide citizens, affected public agencies, representatives of public transportation employees, freight shippers, private providers of transportation, representatives of users of public transportation, representatives of users of pedestrian walkways and bicycle transportation facilities, representatives of the disabled, providers of freight transportation services, and other interested parties with a reasonable opportunity to comment on the proposed plan.

(B) Methods.--In carrying out subparagraph (A), the State shall, to the maximum extent practicable--

(i) hold any public meetings at convenient and accessible locations and times;

(ii) employ visualization techniques to describe plans; and

(iii) make public information available in electronically accessible format and means, such as the World Wide Web, as appropriate to afford

reasonable opportunity for consideration of public information under subparagraph (A).

(4) Mitigation activities.--

(A) In general.--A long-range transportation plan shall include a discussion of potential environmental mitigation activities and potential areas to carry out these activities, including activities that may have the greatest potential to restore and maintain the environmental functions affected by the plan.

(B) Consultation.--The discussion shall be developed in consultation with Federal, State, and tribal wildlife, land management, and regulatory agencies.

(5) Financial plan.--The statewide transportation plan may include a financial plan that demonstrates how the adopted statewide transportation plan can be implemented, indicates resources from public and private sources that are reasonably expected to be made available to carry out the plan, and recommends any additional financing strategies for needed projects and programs. The financial plan may include, for illustrative purposes, additional projects that would be included in the adopted statewide transportation plan if reasonable additional resources beyond those identified in the financial plan were available.

(**6) Selection of projects from illustrative list.**--A State shall not be required to select any project from the illustrative list of additional projects included in the financial plan described in paragraph (5).

(7) Existing system.--The statewide transportation plan should include capital, operations and management strategies, investments, procedures, and other measures to ensure the preservation and most efficient use of the existing transportation system.

(8) Publication of long-range transportation plans.--Each long-range transportation plan prepared by a State shall be published or otherwise made available, including (to the maximum extent practicable) in electronically accessible formats and means, such as the World Wide Web.

(g) Statewide transportation improvement program.--

(1) Development.--Each State shall develop a statewide transportation improvement program for all areas of the State. Such program shall cover a period of 4 years and be updated every 4 years or more frequently if the Governor elects to update more frequently.

(2) Consultation with Governments.--

(A) Metropolitan areas.--With respect to each metropolitan area in the State, the program shall be developed in cooperation with the metropolitan planning organization designated for the metropolitan area under section 5303.

(B) Nonmetropolitan areas.--With respect to each nonmetropolitan area in the State, the program shall be developed in consultation with affected nonmetropolitan local officials with responsibility for transportation. The Secretary shall not review or approve the specific consultation process in the State.

(C) Indian tribal areas.--With respect to each area of the State under the jurisdiction of an Indian tribal government, the program shall be developed in consultation with the tribal government and the Secretary of the Interior.

(3) Participation by interested parties.--In developing the program, the State shall provide citizens, affected public agencies, representatives of public transportation employees, freight shippers, private providers of transportation, providers of freight transportation services, representatives of users of public transportation, representatives of users of pedestrian walkways and bicycle transportation facilities, representatives of the disabled, and other interested parties with a reasonable opportunity to comment on the proposed program.

(4) Included projects.--

(A) In general.--A transportation improvement program developed under this subsection for a State shall include federally supported surface transportation expenditures within the boundaries of the State.

(B) Listing of projects.--An annual listing of projects for which funds have been obligated in the preceding year in each metropolitan planning area shall be published or otherwise made available by the cooperative effort of the State, transit operator, and the metropolitan planning organization for public

review. The listing shall be consistent with the funding categories identified in each metropolitan transportation improvement program.

(C) Projects under chapter 2 of title 23.--

(i) Regionally significant projects.--Regionally significant projects proposed for funding under chapter 2 of title 23 shall be identified individually in the transportation improvement program.

(ii) Other projects.--Projects proposed for funding under chapter 2 of title 23 that are not determined to be regionally significant shall be grouped in 1 line item or identified individually in the transportation improvement program.

(D) Consistency with statewide transportation plan.--Each project shall be--

(i) consistent with the statewide transportation plan developed under this section for the State;

(ii) identical to the project or phase of the project as described in an approved metropolitan transportation plan; and

(iii) in conformance with the applicable State air quality implementation plan developed under the Clean Air Act, if the project is carried out in an area designated as nonattainment for ozone, particulate matter, or carbon monoxide under that Act.

(E) Requirement of anticipated full funding.--The transportation improvement program shall include a project, or an identified phase of a project, only if full funding can reasonably be anticipated to be available for the project within the time period contemplated for completion of the project.

(F) Financial plan.--The transportation improvement program may include a financial plan that demonstrates how the approved transportation improvement program can be implemented, indicates resources from public and private sources that are reasonably expected to be made available to carry out the transportation improvement program, and recommends any additional financing strategies for needed projects and programs. The

financial plan may include, for illustrative purposes, additional projects that would be included in the adopted transportation plan if reasonable additional resources beyond those identified in the financial plan were available.

(G) Selection of projects from illustrative list.--

(i) No required selection.--Notwithstanding subparagraph (F), a State shall not be required to select any project from the illustrative list of additional projects included in the financial plan under subparagraph (F).

(ii) Required action by the Secretary.--Action by the Secretary shall be required for a State to select any project from the illustrative list of additional projects included in the financial plan under subparagraph (F) for inclusion in an approved transportation improvement program.

(H) Priorities.--The transportation improvement program shall reflect the priorities for programming and expenditures of funds, including transportation enhancement activities, required by this chapter and title 23.

(5) Project selection for areas of less than 50,000 population.--Projects carried out in areas with populations of less than 50,000 individuals shall be selected, from the approved transportation improvement program (excluding projects carried out on the National Highway System and projects carried out under the bridge program or the Interstate maintenance program under title 23 or sections 5310, 5311, 5316, and 5317 of this title) by the State in cooperation with the affected nonmetropolitan local officials with responsibility for transportation. Projects carried out in areas with populations of less than 50,000 individuals on the National Highway System or under the bridge program or the Interstate maintenance program under title 23 or sections 5310, 5311, 5316, and 5317 of this title shall be selected, from the approved statewide transportation improvement program, by the State in consultation with the affected nonmetropolitan local officials with responsibility for transportation.

(6) Transportation improvement program approval.--Every 4 years, a transportation improvement program developed under this subsection shall be reviewed and approved by the Secretary if based on a current planning finding.

(7) Planning finding.--A finding shall be made by the Secretary at least every 4 years that the transportation planning process through which statewide

transportation plans and programs are developed is consistent with this section and section 5303.

(8) Modifications to project priority.--Notwithstanding any other provision of law, action by the Secretary shall not be required to advance a project included in the approved transportation improvement program in place of another project in the program.

(h) Funding.--Funds set aside pursuant to section 5305(g) of this title and section 104(i) of title 23 shall be available to carry out this section.

(i) Treatment of certain State laws as congestion management processes.--For purposes of this section and section 5303, and sections 134 and 135 of title 23, State laws, rules, or regulations pertaining to congestion management systems or programs may constitute the congestion management process under this section and section 5303, and sections 134 and 135 of title 23, if the Secretary finds that the State laws, rules, or regulations are consistent with, and fulfill the intent of, the purposes of this section, section 5303, and sections 134 and 135 of title 23, as appropriate.

(j) Continuation of current review practice.--Since the statewide transportation plan and the transportation improvement program described in this section are subject to a reasonable opportunity for public comment, since individual projects included in the statewide transportation plans and the transportation improvement program are subject to review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), and since decisions by the Secretary concerning statewide transportation plans or the transportation improvement program described in this section have not been reviewed under such Act as of January 1, 1997, any decision by the Secretary concerning a metropolitan or statewide transportation plan or the transportation improvement program described in this section shall not be considered to be a Federal action subject to review under such Act.

49 U.S.C. § 5309

Title 49. Transportation
Subtitle III. General and Intermodal Programs
Chapter 53. Public Transportation

§ 5309. Capital investment grants

(a) Definitions.--In this section, the following definitions apply:

(1) Alternatives analysis.--The term 'alternatives analysis' means a study conducted as part of the transportation planning process required under sections 5303 and 5304, which includes--

(A) an assessment of a wide range of public transportation alternatives designed to address a transportation problem in a corridor or subarea;

(B) sufficient information to enable the Secretary to make the findings of project justification and local financial commitment required under this section;

(C) the selection of a locally preferred alternative; and

(D) the adoption of the locally preferred alternative as part of the long-range transportation plan required under section 5303.

(2) Major new fixed guideway capital project.--The term 'major new fixed guideway capital project' means a new fixed guideway capital project for which the Federal assistance provided or to be provided under this section is $75,000,000 or more.

(3) New fixed guideway capital project.--The term 'new fixed guideway capital project' means a minimum operable segment of a capital project for a new fixed guideway system or extension to an existing fixed guideway system.

(b) General authority.--The Secretary may make grants under this section to assist State and local governmental authorities in financing--

(1) new fixed guideway capital projects under subsections (d) and (e), including the acquisition of real property, the initial acquisition of rolling stock for the

systems, the acquisition of rights-of-way, and relocation, for fixed guideway corridor development for projects in the advanced stages of alternatives analysis or preliminary engineering;

(2) capital projects to modernize existing fixed guideway systems;

(3) capital projects to replace, rehabilitate, and purchase buses and related equipment and to construct bus-related facilities, including programs of bus and bus-related projects for assistance to subrecipients that are public agencies, private companies engaged in public transportation, or private nonprofit organizations; and

(4) the development of corridors to support new fixed guideway capital projects under subsections (d) and (e), including protecting rights-of-way through acquisition, construction of dedicated bus and high occupancy vehicle lanes and park and ride lots, and other nonvehicular capital improvements that the Secretary may decide would result in increased public transportation usage in the corridor.

(c) Grant requirements.--

(1) In general.--The Secretary may not approve a grant for a project under this section unless the Secretary determines that--

(A) the project is part of an approved transportation plan and program of projects required under sections 5303, 5304, and 5306; and

(B) the applicant has, or will have--

(i) the legal, financial, and technical capacity to carry out the project, including safety and security aspects of the project;

(ii) satisfactory continuing control over the use of the equipment or facilities; and

(iii) the capability and willingness to maintain the equipment or facilities.

(2) Certification.--An applicant that has submitted the certifications required under subparagraphs (A), (B), (C), and (H) of section 5307(d)(1) shall be

deemed to have provided sufficient information upon which the Secretary may make the determinations required under this subsection.

(3) Grantee requirements.--The Secretary shall require that any grant awarded under this section to a recipient be subject to all terms, conditions, requirements, and provisions that the Secretary determines to be necessary or appropriate for the purposes of this section, including requirements for the disposition of net increases in the value of real property resulting from the project assisted under this section.

(d) Major capital investment grants of $75,000,000 or more--

(1) Full funding grant agreement.--

(A) In general.--A major new fixed guideway capital project shall be carried out through a full funding grant agreement.

(B) Criteria.--The Secretary shall enter into a full funding grant agreement, based on the evaluations and ratings required under this subsection, with each grantee receiving assistance for a major new fixed guideway capital project that--

(i) is authorized for final design and construction; and

(ii) has been rated as medium, medium-high, or high, in accordance with paragraph (5)(B).

(2) Approval of grants.--The Secretary may approve a grant under this section for a major new fixed guideway capital project only if the Secretary, based upon evaluations and considerations set forth in paragraph (3), determines that the project is--

(A) based on the results of an alternatives analysis and preliminary engineering;

(B) justified based on a comprehensive review of its mobility improvements, environmental benefits, cost effectiveness, operating efficiencies, economic development effects, and public transportation supportive land use policies and future patterns; and

(C) supported by an acceptable degree of local financial commitment (including evidence of stable and dependable financing sources) to construct, maintain, and operate the system or extension, and maintain and operate the entire public transportation system without requiring a reduction in existing public transportation services or level of service to operate the proposed project.

(3) Evaluation of project justification.--In making the determinations under paragraph (2)(B) for a major capital investment grant, the Secretary shall analyze, evaluate, and consider--

(A) the results of the alternatives analysis and preliminary engineering for the proposed project;

(B) the reliability of the forecasting methods used to estimate costs and utilization made by the recipient and the contractors to the recipient;

(C) the direct and indirect costs of relevant alternatives;

(D) factors such as--

(i) congestion relief;

(ii) improved mobility;

(iii) air pollution;

(iv) noise pollution;

(v) energy consumption; and

(vi) all associated ancillary and mitigation costs necessary to carry out each alternative analyzed;

(E) reductions in local infrastructure costs and other benefits achieved through compact land use development, such as positive impacts on the capacity, utilization, or longevity of other surface transportation assets and facilities;

(F) the cost of suburban sprawl;

(G) the degree to which the project increases the mobility of the public transportation dependent population or promotes economic development;

(H) population density and current transit ridership in the transportation corridor;

(I) the technical capability of the grant recipient to construct the project;

(J) any adjustment to the project justification necessary to reflect differences in local land, construction, and operating costs; and

(K) other factors that the Secretary determines to be appropriate to carry out this subsection.

(4) Evaluation of local financial commitment.--

(A) In general.--In evaluating a project under paragraph (2)(C), the Secretary shall require that--

(i) the proposed project plan provides for the availability of contingency amounts that the Secretary determines to be reasonable to cover unanticipated cost increases;

(ii) each proposed local source of capital and operating financing is stable, reliable, and available within the proposed project timetable; and

(iii) local resources are available to recapitalize and operate the overall proposed public transportation system, including essential feeder bus and other services necessary to achieve the projected ridership levels without requiring a reduction in existing public transportation services or level of service to operate the proposed project.

(B) Evaluation criteria.--In assessing the stability, reliability, and availability of proposed sources of local financing under paragraph (2)(C), the Secretary shall consider--

(i) the reliability of the forecasting methods used to estimate costs and utilization made by the recipient and the contractors to the recipient;

(ii) existing grant commitments;

(iii) the degree to which financing sources are dedicated to the proposed purposes;

(iv) any debt obligation that exists, or is proposed by the recipient, for the proposed project or other public transportation purpose; and

(v) the extent to which the project has a local financial commitment that exceeds the required non-Federal share of the cost of the project.

(C) Consideration of fiscal capacity of State and local Governments.--If the Secretary gives priority to financing projects under this subsection that include more than the non-Federal share required under subsection (h), the Secretary shall give equal consideration to differences in the fiscal capacity of State and local governments.

(5) Project advancement and ratings.--

(A) Project advancement.--A proposed project under this subsection shall not advance from alternatives analysis to preliminary engineering or from preliminary engineering to final design and construction unless the Secretary determines that the project meets the requirements of this section and there is a reasonable likelihood that the project will continue to meet such requirements.

(B) Ratings.--In making a determination under subparagraph (A), the Secretary shall evaluate and rate the project on a 5-point scale (high, medium-high, medium, medium-low, or low) based on the results of the alternatives analysis, the project justification criteria, and the degree of local financial commitment, as required under this subsection. In rating the projects, the Secretary shall provide, in addition to the overall project rating, individual ratings for each of the criteria established by this subsection and shall give comparable, but not necessarily equal, numerical weight to each project justification criteria in calculating the overall project rating.

(6) Policy guidance.--

(A) Publication.--The Secretary shall publish policy guidance regarding the new fixed guideway capital project review and evaluation process and criteria--

(i) not later than 120 days after the date of enactment of the Federal Public Transportation Act of 2005; and

(ii) each time significant changes are made by the Secretary to the process and criteria, but not less frequently than once every 2 years.

(B) Public comment and response.--The Secretary shall--

(i) invite public comment to the policy guidance published under subparagraph (A); and

(ii) publish a response to the comments received under clause (i).

(e) Capital investment grants less than $75,000,000--

(1) In general.--

(A) Applicability of requirements.--Except as provided by subparagraph (B), a new fixed guideway capital project shall be subject to the requirements of this subsection if the Federal assistance provided or to be provided under this section for the project is less than $75,000,000 and the total estimated net capital cost of the project is less than $250,000,000.

(B) Projects receiving less than $25,000,000 in Federal assistance--If the assistance provided under this section with respect to a new fixed guideway capital project is less than $25,000,000, the requirements of this subsection shall not apply to the project until such date as the final regulation to be issued under paragraph (9) takes effect.

(2) Selection criteria.--The Secretary may provide Federal assistance under this subsection with respect to a proposed project only if the Secretary finds that the project is--

(A) based on the results of planning and alternatives analysis;

(B) justified based on a review of its public transportation supportive land use policies, cost effectiveness, and effect on local economic development; and

(C) supported by an acceptable degree of local financial commitment.

(3) Planning and alternatives.--In evaluating a project under paragraph (2)(A), the Secretary shall analyze and consider the results of planning and alternatives analysis for the project.**(4) Project justification.**--For purposes of making the finding under paragraph (2)(B), the Secretary shall--

(A) determine the degree to which the project is consistent with local land use policies and is likely to achieve local developmental goals;

(B) determine the cost effectiveness of the project at the time of the initiation of revenue service;

(C) determine the degree to which the project will have a positive effect on local economic development;

(D) consider the reliability of the forecasting methods used to estimate costs and ridership associated with the project; and

(E) consider other factors that the Secretary determines appropriate to carry out this subsection.

(5) Local financial commitment.--

(A) In general.--For purposes of paragraph (2)(C), the Secretary shall require that each proposed local source of capital and operating financing is stable, reliable, and available within the proposed project timetable.

(B) Consideration of fiscal capacity of State and local governments.--If the Secretary gives priority to financing projects under this subsection that include more than the non-Federal share required under subsection (h), the Secretary shall give equal consideration to differences in the fiscal capacity of State and local governments.

(6) Advancement of project to development and construction.--

(A) General rule.--A proposed project under this subsection may advance from planning and alternatives analysis to project development and construction only if the Secretary finds that the project meets the requirements of this subsection and there is a reasonable likelihood that the project will continue to meet such requirements.

(B) Evaluation.--In making the findings under subparagraph (A), the Secretary shall evaluate and rate the project as high, medium-high, medium, medium-low, or low based on the results of the analysis of the project justification criteria and the degree of local financial commitment, as required by this subsection and shall give comparable, but not necessarily equal, numerical weight to each project justification criteria in calculating the overall project rating.

(7) Contents of project construction grant agreement.--A project construction grant agreement under this subsection shall specify the scope of the project to be constructed, the estimated net project cost of the project, the schedule under which the project shall be constructed, the maximum amount of funding to be obtained under this subsection, the proposed schedule for obligation of future Federal grants, and the sources of funding from other than the Government. The agreement may include a commitment on the part of the Secretary to provide funding for the project in future fiscal years.

(8) Limitation on entry into construction grant agreement.--The Secretary may enter into a project construction grant agreement for a project under this subsection only if the project is authorized for construction and has been rated as high, medium-high, or medium under this subsection.

(9) Regulations.--Not later than 240 days after the date of enactment of the Federal Public Transportation Act of 2005, the Secretary shall issue regulations establishing an evaluation and rating process for proposed projects under this subsection that is based on the results of project justification and local financial commitment, as required under this subsection.

(10) Fixed guideway capital project.--In this subsection, the term ‘fixed guideway capital project’ includes a corridor-based bus capital project if--

(A) a substantial portion of the project operates in a separate right-of-way dedicated for public transit use during peak hour operations; or

(B) the project represents a substantial investment in a defined corridor as demonstrated by features such as park-and-ride lots, transit stations, bus arrival and departure signage, intelligent transportation systems technology, traffic signal priority, off-board fare collection, advanced bus technology, and other features that support the long-term corridor investment.

(11) Impact report.--

(A) In general.--Not later than 120 days after the date of enactment of the Federal Public Transportation Act of 2005, the Federal Transit Administration shall submit to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives a report on the methodology to be used in evaluating the land use and economic development impacts of non-fixed guideway or partial fixed guideway projects.

(B) Contents.--The report submitted under subparagraph (A) shall address any qualitative and quantitative differences between fixed guideway and non-fixed guideway projects with respect to land use and economic development impacts.

(f) Previously issued letter of intent or full funding grant agreement.--Subsections (d) and (e) do not apply to projects for which the Secretary has issued a letter of intent or entered into a full funding grant agreement before the date of enactment of the Federal Public Transportation Act of 2005. Subsection (e) also does not apply to projects for which the Secretary has received an application for final design before such date of enactment.

(g) Letters of intent, full funding grant agreements, and early systems work agreements.--

(1) Letters of intent.--

(A) Amounts intended to be obligated.--The Secretary may issue a letter of intent to an applicant announcing an intention to obligate, for a capital project under this section, an amount from future available budget authority specified in law that is not more than the amount stipulated as the financial participation of the Secretary in the project. When a letter is issued for fixed guideway projects, the amount shall be sufficient to complete at least an operable segment.

(B) Treatment.--The issuance of a letter under subparagraph (A) is deemed not to be an obligation under sections 1108(c), 1108(d), 1501, and 1502(a) of title 31 or an administrative commitment.

(2) Full funding grant agreements.--

(A) Terms.--The Secretary may make a full funding grant agreement with an applicant. The agreement shall--

(i) establish the terms of participation by the Government in a project under this section;

(ii) establish the maximum amount of Government financial assistance for the project;

(iii) cover the period of time for completing the project, including a period extending beyond the period of an authorization; and

(iv) make timely and efficient management of the project easier according to the law of the United States.

(B) Special financial rules.--

(i) In general.--A full funding grant agreement under this paragraph obligates an amount of available budget authority specified in law and may include a commitment, contingent on amounts to be specified in law in advance for commitments under this paragraph, to obligate an additional amount from future available budget authority specified in law.

(ii) Statement of contingent commitment.--The agreement shall state that the contingent commitment is not an obligation of the Government.

(iii) Interest and other financing costs.--Interest and other financing costs of efficiently carrying out a part of the project within a reasonable time are a cost of carrying out the project under a full funding grant agreement, except that eligible costs may not be more than the cost of the most favorable financing terms reasonably available for the project at the time of borrowing. The applicant shall certify, in a way satisfactory to the

Secretary, that the applicant has shown reasonable diligence in seeking the most favorable financing terms.

(iv) Completion of operable segment.--The amount stipulated in an agreement under this paragraph for a fixed guideway project shall be sufficient to complete at least an operable segment.

(C) Before and after study.--

(i) In general.--A full funding grant agreement under this paragraph shall require the applicant to conduct a study that--

(I) describes and analyzes the impacts of the new fixed guideway capital project on transit services and transit ridership;

(II) evaluates the consistency of predicted and actual project characteristics and performance; and

(III) identifies sources of differences between predicted and actual outcomes.

(ii) Information collection and analysis plan.--

(I) Submission of plan.--Applicants seeking an agreement under this paragraph shall submit a complete plan for the collection and analysis of information to identify the impacts of the new fixed guideway capital project and the accuracy of the forecasts prepared during the development of the project. Preparation of this plan shall be included in the full funding grant agreement as an eligible activity.

(II) Contents of plan.--The plan submitted under subclause (I) shall provide for--

(aa) the collection of data on the current transit system regarding transit service levels and ridership patterns, including origins and destinations, access modes, trip purposes, and rider characteristics;

(bb) documentation of the predicted scope, service levels, capital costs, operating costs, and ridership of the project;

(cc) collection of data on the transit system 2 years after the opening of the new fixed guideway capital project, including analogous information on transit service levels and ridership patterns and information on the as-built scope and capital costs of the project; and

(dd) analysis of the consistency of predicted project characteristics with the after data.

(D) Collection of data on current system.--To be eligible for a full funding grant agreement under this paragraph, recipients shall have collected data on the current system, according to the plan required, before the beginning of construction of the proposed new start project. Collection of this data shall be included in the full funding grant agreement as an eligible activity.

(3) Early system work agreements.--

(A) Conditions.--The Secretary may make an early systems work agreement with an applicant if a record of decision under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) has been issued on the project and the Secretary finds there is reason to believe--

(i) a full funding grant agreement for the project will be made; and

(ii) the terms of the work agreement will promote ultimate completion of the project more rapidly and at less cost.

(B) Contents.--

(i) In general.--A work agreement under this paragraph obligates an amount of available budget authority specified in law and shall provide for reimbursement of preliminary costs of carrying out the project, including land acquisition, timely procurement of system elements for which specifications are decided, and other activities the Secretary decides are appropriate to make efficient, long-term project management easier.

(ii) Period covered.--A work agreement under this paragraph shall cover the period of time the Secretary considers appropriate. The period may extend beyond the period of current authorization.

(iii) Interest and other financing costs.--Interest and other financing costs of efficiently carrying out the work agreement within a reasonable time are a cost of carrying out the agreement, except that eligible costs may not be more than the cost of the most favorable financing terms reasonably available for the project at the time of borrowing. The applicant shall certify, in a way satisfactory to the Secretary, that the applicant has shown reasonable diligence in seeking the most favorable financing terms.

(iv) Failure to carry out project.--If an applicant does not carry out the project for reasons within the control of the applicant, the applicant shall repay all Government payments made under the work agreement plus reasonable interest and penalty charges the Secretary establishes in the agreement.

(4) Limitation on amounts.--

(A) Major capital investment grants contingent commitment authority.--The total estimated amount of future obligations of the Government and contingent commitments to incur obligations covered by all outstanding letters of intent, full funding grant agreements, and early systems work agreements under this subsection for major new fixed guideway capital projects may be not more than the greater of the amount authorized under sections 5338(a)(3) and 5338(c) for such projects or an amount equivalent to the last 3 fiscal years of funding allocated under subsections (m)(1)(A) and (m)(2)(A)(ii) for such projects, less an amount the Secretary reasonably estimates is necessary for grants under this section for those of such projects that are not covered by a letter or agreement. The total amount covered by new letters and contingent commitments included in full funding grant agreements and early systems work agreements for such projects may be not more than a limitation specified in law.

(B) Other contingent commitment authority.--The total estimated amount of future obligations of the Government and contingent commitments to incur obligations covered by all project construction grant agreements and early system work agreements under this subsection for small capital projects described in subsection (e) may be not more than the greater of the amount allocated under subsection (m)(2)(A)(i) for such projects or an amount equivalent to the last fiscal year of funding allocated under such

subsection for such projects, less an amount the Secretary reasonably estimates is necessary for grants under this section for those of such projects that are not covered by an agreement. The total amount covered by new contingent commitments included in project construction grant agreements and early systems work agreements for such projects may be not more than a limitation specified in law.

(C) Inclusion of certain commitments.--Future obligations of the Government and contingent commitments made against the contingent commitment authority under section 3032(g)(2) of the Intermodal Surface Transportation Efficiency Act of 1991 (106 Stat. 2125) for the San Francisco BART to the Airport project for fiscal years 2002, 2003, 2004, 2005, and 2006 shall be charged against section 3032(g)(2) of that Act.

(D) Appropriation required.--An obligation may be made under this subsection only when amounts are appropriated for the obligation.

(5) Notification of Congress.--At least 60 days before issuing a letter of intent or entering into a full funding grant agreement or project construction grant agreement under this section, the Secretary shall notify, in writing, the Committees on Transportation and Infrastructure and Appropriations of the House of Representatives and the Committees on Banking, Housing, and Urban Affairs and Appropriations of the Senate of the proposed letter or agreement. The Secretary shall include with the notification a copy of the proposed letter or agreement as well as the evaluations and ratings for the project.

(h) Government ŝ share of net project cost.--

(1) In general.--Based on engineering studies, studies of economic feasibility, and information on the expected use of equipment or facilities, the Secretary shall estimate the net project cost. A grant for the project shall be for 80 percent of the net capital project cost, unless the grant recipient requests a lower grant percentage.

(2) Adjustment for completion under budget.--The Secretary may adjust the final net project cost of a new fixed guideway capital project evaluated under subsections (d) and (e) to include the cost of eligible activities not included in the originally defined project if the Secretary determines that the originally defined project has been completed at a cost that is significantly below the original estimate.

(3) Maximum Government share.--The Secretary may provide a higher grant percentage than requested by the grant recipient if--

(A) the Secretary determines that the net project cost of the project is not more than 10 percent higher than the net project cost estimated at the time the project was approved for advancement into preliminary engineering; and

(B) the ridership estimated for the project is not less than 90 percent of the ridership estimated for the project at the time the project was approved for advancement into preliminary engineering.

(4) Remainder of net project cost.--The remainder of net project costs shall be provided from an undistributed cash surplus, a replacement or depreciation cash fund or reserve, or new capital.

(5) Limitation on statutory construction.--Nothing in this section, including paragraph (1) and subsections (d)(4)(B)(v) and (e)(5), shall be construed as authorizing the Secretary to require a non-Federal financial commitment for a project that is more than 20 percent of the net capital project cost.

(6) Special rule for rolling stock costs.--In addition to amounts allowed pursuant to paragraph (1), a planned extension to a fixed guideway system may include the cost of rolling stock previously purchased if the applicant satisfies the Secretary that only amounts other than amounts of the Government were used and that the purchase was made for use on the extension. A refund or reduction of the remainder may be made only if a refund of a proportional amount of the grant of the Government is made at the same time.

(7) Limitation on applicability.--This subsection does not apply to projects for which the Secretary has entered into a full funding grant agreement before the date of enactment of the Federal Public Transportation Act of 2005.

(i) Undertaking projects in advance.--

(1) In general.--The Secretary may pay the Government's share of the net capital project cost to a State or local governmental authority that carries out any part of a project described in this section without the aid of amounts of the Government and according to all applicable procedures and requirements if--

(A) the State or local governmental authority applies for the payment;

(B) the Secretary approves the payment; and

(C) before carrying out the part of the project, the Secretary approves the plans and specifications for the part in the same way as other projects under this section.

(2) Financing costs.--

(A) In general.--The cost of carrying out part of a project includes the amount of interest earned and payable on bonds issued by the State or local governmental authority to the extent proceeds of the bonds are expended in carrying out the part.

(B) Limitation on amount of interest.--The amount of interest under this paragraph may not be more than the most favorable interest terms reasonably available for the project at the time of borrowing.

(C) Certification.--The applicant shall certify, in a manner satisfactory to the Secretary, that the applicant has shown reasonable diligence in seeking the most favorable financial terms.

(j) Availability of amounts.--

(1) In general.--An amount made available or appropriated under section 5338(a)(3)(C)(iii), 5338(a)(3)(C)(iv), 5338(b)(2)(E), or 5338(c) for replacement, rehabilitation, and purchase of buses and related equipment and construction of bus-related facilities or for new fixed guideway capital projects shall remain available for 3 fiscal years, including the fiscal year in which the amount is made available or appropriated. Any of such amounts that are unobligated at the end of the 3-fiscal-year period may be used by the Secretary for any purpose under this section.

(2) Use of deobligated amounts.--An amount available under this section that is deobligated may be used for any purpose under this section.

(k) Reports on new starts.--

(1) Annual report on funding recommendations.--Not later than the first Monday in February of each year, the Secretary shall submit to the Committees on Transportation and Infrastructure and Appropriations of the House of Representatives and the Committees on Banking, Housing, and Urban Affairs and Appropriations of the Senate a report that includes--

(A) a proposal of allocations of amounts to be available to finance grants for new fixed guideway capital projects among applicants for these amounts;

(B) evaluations and ratings, as required under subsections (d) and (e), for each such project that is authorized by the Federal Public Transportation Act of 2005; and

(C) recommendations of such projects for funding based on the evaluations and ratings and on existing commitments and anticipated funding levels for the next 3 fiscal years based on information currently available to the Secretary.

(2) Annual GAO review.--The Comptroller General shall--

(A) conduct an annual review of--

(i) the processes and procedures for evaluating, rating, and recommending new fixed guideway capital projects; and

(**ii)** the Secretary's implementation of such processes and procedures; and

(B) report to Congress on the results of such review by May 31 of each year.

(l) Other reports.--

(1) Before and after study reports.--Not later than the first Monday of August of each year, the Secretary shall submit to the committees referred to in subsection (k)(1) a report containing a summary of the results of the studies conducted under subsection (g)(2)(C).

(2) Contractor performance assessment report.--

(A) In general.--Not later than 180 days after the enactment of the Federal Public Transportation Act of 2005, and each year thereafter, the Secretary

shall submit to the committees referred to in subsection (k)(1) a report analyzing the consistency and accuracy of cost and ridership estimates made by each contractor to public transportation agencies developing new fixed guideway capital projects.

(B) Contents.--The report submitted under subparagraph (A) shall compare the cost and ridership estimates made at the time projects are approved for entrance into preliminary engineering with--

(i) estimates made at the time projects are approved for entrance into final design;

(ii) costs and ridership when the project commences revenue operation; and

(iii) costs and ridership when the project has been in operation for 2 years.

(C) Considerations.--In making comparisons under subparagraph (B), the Secretary shall consider factors having an impact on costs and ridership not under the control of the contractor. The Secretary shall also consider the role taken by each contractor in the development of the project.

(3) Contractor performance incentive report.--Not later than 180 days after the enactment of the Federal Public Transportation Act of 2005, the Secretary shall submit to the committees referred to in subsection (k)(1) a report on the suitability of allowing contractors to public transportation agencies that undertake new fixed guideway capital projects under this section to receive performance incentive awards if a project is completed for less than the original estimated cost.

(m) Allocating amounts.--

(1) Fiscal year 2005.--Of the amounts made available or appropriated for fiscal year 2005 under section 5338(a)(3)--

(A) $1,437,829,600 shall be allocated for new fixed capital projects under subsection (d);

(B) $1,204,684,800 shall be allocated for capital projects for fixed guideway modernization; and

(C) $669,600,000 shall be allocated for capital projects for buses and bus-related equipment and facilities.

(2) Fiscal years 2006 through 2012.--The amounts made available or appropriated for fiscal years 2006 through 2012 under sections 5338(b) and 5338(c) shall be allocated as follows:

(A) Capital investment grants.--Of the amounts appropriated under section 5338(c)--

(i) $200,000,000 for each of fiscal years 2007 through 2012 shall be allocated for projects for new fixed guideway capital projects of less than $75,000,000 in accordance with subsection (e); and

(ii) the remainder shall be allocated for major new fixed guideway capital projects in accordance with subsection (d).

(B) Fixed guideway modernization.--The amounts made available under section 5338(b)(2)(D) shall be allocated for capital projects for fixed guideway modernization.

(C) Buses and bus-related equipment and facilities.--The amounts made available under section 5338(b)(2)(E) shall be allocated for capital projects for buses and bus-related equipment and facilities.

(3) Fixed guideway modernization.--The amounts made available for fixed guideway modernization under section 5338(b)(2)(D) for fiscal year 2006 and each fiscal year thereafter shall be allocated in accordance with section 5337.

(4) Preliminary engineering and alternatives analysis.--Not more that 8 percent of the allocation described in paragraph (1)(A) may be expended on alternatives analysis and preliminary engineering.

(5) Preliminary engineering.--Not more than 8 percent of the allocation described in paragraph (2)(A) may be expended on preliminary engineering.

(6) Funding for ferry boats.--Of the amounts described in paragraphs (1)(A) and (2)(A)--

(A) $10,400,000 shall be available in fiscal year 2005 for capital projects in Alaska and Hawaii for new fixed guideway systems and extension projects utilizing ferry boats, ferry boat terminals, or approaches to ferry boat terminals;

(B) $15,000,000 shall be available in each of fiscal years 2006 through 2012 for capital projects in Alaska and Hawaii for new fixed guideway ferry systems and extension projects utilizing ferry boats, ferry boat terminals, or approaches to ferry boat terminals; and

(C) $5,000,000 shall be available for each of fiscal years 2006 through 2012 for payments to the Denali Commission under the terms of section 307(e) of the Denali Commission Act of 1998 (42 U.S.C. 3121 note) for docks, waterfront development projects, and related transportation infrastructure.

(7) Bus and bus facility grants.--The amounts made available under paragraphs (1)(C) and (2)(C) shall be allocated as follows:

(A) Ferry boat systems.--$10,000,000 shall be available in each of fiscal years 2006 through 2012 for ferry boats or ferry terminal facilities. Of such funds, the following amounts shall be set aside for each fiscal year:

(i) $2,500,000 for the San Francisco Water Transit Authority.

(ii) $2,500,000 for the Massachusetts Bay Transportation Authority Ferry System.

(iii) $1,000,000 for the Camden, New Jersey Ferry System.

(iv) $1,000,000 for the Governor's Island, New York Ferry System.

(v) $1,000,000 for the Philadelphia Penn's Landing Ferry Terminal.

(vi) $1,000,000 for the Staten Island Ferry.

(vii) $650,000 for the Maine State Ferry Service, Rockland.

(viii) $350,000 for the Swans Island, Maine Ferry Service.

(B) Fuel cell bus program.--The following amounts shall be set aside for the national fuel cell bus technology development program under section 3045 of the Federal Public Transportation Act of 2005:

(i) $11,250,000 for fiscal year 2006.

(ii) $11,500,000 for fiscal year 2007.

(iii) $12,750,000 for fiscal year 2008.

(iv) $13,500,000 for fiscal year 2009.

(v) $13,500,000 for fiscal year 2010.

(vi) (vi) $13,500,000 for fiscal year 2011.. [sic]

(vii) $13,500,000 for fiscal year 2012.

(C) Projects not in urbanized areas.--Not less than 5.5 percent shall be available in each fiscal year for projects that are not in urbanized areas.

(D) Intermodal terminals.--Not less than $35,000,000 shall be available in each fiscal year for intermodal terminal projects, including the intercity bus portion of such projects.

(E) Bus testing.--$3,000,000 shall be available in each fiscal year for bus testing under section 5318.

(8) Bus and bus facility grant considerations.--In making grants under paragraphs (1)(C) and (2)(C), the Secretary shall consider the age and condition of buses, bus fleets, related equipment, and bus-related facilities."

Haw. Rev. Stat. § 6E-5

Title 1. General Provisions
Chapter 6E. Historic Preservation
Part 1. Historic Preservation Program

§ 6E-5. State historic preservation officer

The governor shall appoint a state historic preservation officer, and may appoint the officer without regard to chapter 76, who shall be responsible for the comprehensive historic preservation program and who shall be the state liaison officer for the conduct of relations with the federal government and the respective states with regard to matters of historic preservation. The state historic preservation officer shall be appointed on the basis of professional competence and experience in the field of historic preservation and shall be placed in the department for the purposes of the state program.

Haw. Rev. Stat. § 46-16.8

Title 6. County Organization and Administration
Subtitle 1. Provisions Common to All Counties
Chapter 46. General Provisions
Part I. General Jurisdiction and Powers

§ 46-16.8. County surcharge on state tax

(a) Each county may establish a surcharge on state tax at the rates enumerated in sections 237-8.6 and 238-2.6. A county electing to establish this surcharge shall do so by ordinance; provided that:

(1) No ordinance shall be adopted until the county has conducted a public hearing on the proposed ordinance;

(2) The ordinance shall be adopted prior to December 31, 2005; and

(3) No county surcharge on state tax that may be authorized under this section shall be levied prior to January 1, 2007.

Notice of the public hearing required under paragraph (1) shall be published in a newspaper of general circulation within the county at least twice within a period of thirty days immediately preceding the date of the hearing.

(b) A county electing to exercise the authority granted under this section shall notify the director of taxation within ten days after the county has adopted a surcharge on state tax ordinance and, beginning no earlier than January 1, 2007, the director of taxation shall levy, assess, collect, and otherwise administer the county surcharge on state tax.

(c) Each county with a population greater than five hundred thousand that adopts a county surcharge on state tax ordinance pursuant to subsection (a) shall use the surcharges received from the State for:

(1) Operating or capital costs of a locally preferred alternative for a mass transit project; and

(2) Expenses in complying with the Americans with Disabilities Act of 1990 with respect to paragraph (1).

The county surcharge on state tax shall not be used to build or repair public roads or highways, bicycle paths, or support public transportation systems already in existence prior to July 12, 2005.

(d) Each county with a population equal to or less than five hundred thousand that adopts a county surcharge on state tax ordinance pursuant to subsection (a) shall use the surcharges received from the State for:

(1) Operating or capital costs of public transportation within each county for public transportation systems, including public roadways or highways, public buses, trains, ferries, pedestrian paths or sidewalks, or bicycle paths; and

(2) Expenses in complying with the Americans with Disabilities Act of 1990 with respect to paragraph (1).

(e) As used in this section, “capital costs” means nonrecurring costs required to construct a transit facility or system, including debt service, costs of land acquisition and development, acquiring of rights-of-way, planning, design, and construction, and including equipping and furnishing the facility or system.

23 C.F.R. § 450.318

Title 23. Highways
Chapter I. Federal Highway Administration, Department of Transportation
Subchapter E. Planning and Research
Part 450. Planning Assistance and Standards
Subpart C. Metropolitan Transportation Planning and Programming

§ 450.318. Transportation planning studies and project development

(a) Pursuant to section 1308 of the Transportation Equity Act for the 21st Century, TEA–21 (Pub.L. 105–178), an MPO(s), State(s), or public transportation operator(s) may undertake a multimodal, systems-level corridor or subarea planning study as part of the metropolitan transportation planning process. To the extent practicable, development of these transportation planning studies shall involve consultation with, or joint efforts among, the MPO(s), State(s), and/or public transportation operator(s). The results or decisions of these transportation planning studies may be used as part of the overall project development process consistent with the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 et seq.) and associated implementing regulations (23 CFR part 771 and 40 CFR parts 1500–1508). Specifically, these corridor or subarea studies may result in producing any of the following for a proposed transportation project:

(1) Purpose and need or goals and objective statement(s);

(2) General travel corridor and/or general mode(s) definition (e.g., highway, transit, or a highway/transit combination);

(3) Preliminary screening of alternatives and elimination of unreasonable alternatives;

(4) Basic description of the environmental setting; and/or

(5) Preliminary identification of environmental impacts and environmental mitigation.

(b) Publicly available documents or other source material produced by, or in support of, the transportation planning process described in this subpart may be

incorporated directly or by reference into subsequent NEPA documents, in accordance with 40 CFR 1502.21, if:

(1) The NEPA lead agencies agree that such incorporation will aid in establishing or evaluating the purpose and need for the Federal action, reasonable alternatives, cumulative or other impacts on the human and natural environment, or mitigation of these impacts; and

(2) The systems-level, corridor, or subarea planning study is conducted with:

(i) Involvement of interested State, local, Tribal, and Federal agencies;

(ii) Public review;

(iii) Reasonable opportunity to comment during the metropolitan transportation planning process and development of the corridor or subarea planning study;

(iv) Documentation of relevant decisions in a form that is identifiable and available for review during the NEPA scoping process and can be appended to or referenced in the NEPA document; and

(v) The review of the FHWA and the FTA, as appropriate.

(c) By agreement of the NEPA lead agencies, the above integration may be accomplished through tiering (as described in 40 CFR 1502.20), incorporating the subarea or corridor planning study into the draft Environmental Impact Statement (EIS) or Environmental Assessment, or other means that the NEPA lead agencies deem appropriate.

(d) For transit fixed guideway projects requiring an Alternatives Analysis (49 U.S.C. 5309(d) and (e)), the Alternatives Analysis described in 49 CFR part 611 constitutes the planning required by section 1308 of the TEA–21. The Alternatives Analysis may or may not be combined with the preparation of a NEPA document (e.g., a draft EIS). When an Alternatives Analysis is separate from the preparation of a NEPA document, the results of the Alternatives Analysis may be used during a subsequent environmental review process as described in paragraph (a).

(e) Additional information to further explain the linkages between the transportation planning and project development/NEPA processes is contained in

Appendix A to this part, including an explanation that it is non-binding guidance material.

23 C.F.R. § 771.113

Title 23. Highways
Chapter I. Federal Highway Administration, Department of Transportation
Subchapter H. Right-Of-Way and Environment
Part 771. Environmental Impact and Related Procedures

§ 771.113. Timing of Administration activities

(a) The lead agencies, in cooperation with the applicant (if not a lead agency), will perform the work necessary to complete a finding of no significant impact (FONSI) or a record of decision (ROD) 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, purchase of construction materials or rolling stock, or project construction shall not proceed until the following have been completed, except as otherwise provided in law or in paragraph (d) of this section:

(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 Administration 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) Completion of the requirements set forth in paragraphs (a)(1) and (2) of this section is considered acceptance of the general project location and concepts described in the environmental review documents unless otherwise specified by the approving official.

(c) Letters of Intent issued under the authority of 49 U.S.C. 5309(g) are used by FTA to indicate an intention to obligate future funds for multi-year capital transit projects. Letters of Intent will not be issued by FTA until the NEPA process is completed.

(d) The prohibition in paragraph (a)(1) of this section is limited by the following exceptions:

(1) Exceptions for hardship and protective acquisitions of real property are addressed in paragraph (d)(12) of § 771.117 for FHWA. Exceptions for the acquisitions of real property are addressed in paragraphs (c)(6) and (d)(3) of § 771.118 for FTA.

(2) Paragraph (d)(4) of § 771.118 contains an exception for the acquisition of right-of-way for future transit use in accordance with 49 U.S.C. 5323(q).

(3) FHWA regulations at 23 CFR 710.503 establish conditions for FHWA approval of Federal-aid highway funding for hardship and protective acquisitions.

(4) FHWA regulations at 23 CFR 710.501 address early acquisition of right-of-way by a State prior to the execution of a project agreement with the FHWA or completion of NEPA. In paragraphs (b) and (c) of § 710.501, the regulation establishes conditions governing subsequent requests for Federal-aid credit or reimbursement for the acquisition. Any State-funded early acquisition for a Federal-aid highway project where there will not be Federal-aid highway credit or reimbursement for the early acquisition is subject to the limitations described in the CEQ regulations at 40 CFR 1506.1 and other applicable Federal requirements.

(5) A limited exception for rolling stock is provided in 49 U.S.C. 5309(h)(6).

23 C.F.R. § 771.123

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Part 771. Environmental Impact and Related Procedures

§ 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 applicant, after consultation with any project sponsor that is not the applicant, has notified the Administration in accordance with 23 U.S.C. 139(e) and 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 lead agencies, in cooperation with the applicant (if not a lead agency), will begin a scoping process which may take into account any planning work already accomplished, in accordance with 23 CFR 450.212 or 450.318. The scoping process will be used to identify the purpose and need, the range of alternatives and impacts, and the significant issues to be addressed in the EIS and to achieve the other objectives of40 CFR 1501.7. For the FHWA, scoping is normally achieved through public and agency involvement procedures required by § 771.111. For FTA, 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 lead agencies, in cooperation with the applicant (if not a lead agency). 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) Any of the lead agencies may select a consultant to assist in the preparation of an EIS in accordance with applicable contracting procedures and with 40 CFR 1506.5(c).

(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 FTA 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 fewer than 45 days nor more than 60 days for the return of comments on the draft EIS unless a different period is established in accordance with 23 U.S.C. 139(g)(2)(A). The notice and the draft EIS transmittal letter shall identify where comments are to be sent.

23 C.F.R. § 771.125

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Chapter I. Federal Highway Administration, Department of Transportation
Subchapter H. Right-Of-Way and Environment
Part 771. Environmental Impact and Related Procedures

§ 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 lead agencies, in cooperation with the applicant (if not a lead agency). 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 paragraphs (b) and (d) of § 771.109. 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) [Reserved by 74 FR 12530]

(d) The signature of the FTA approving official on the cover sheet also indicates compliance with 49 U.S.C. 5324(b) and fulfillment of the grant application requirements of 49 U.S.C. 5323(b).

(e) Approval of the final EIS is not an Administration action as defined in paragraph (c) of § 771.107 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.

23 C.F.R. § 771.130

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Chapter I. Federal Highway Administration, Department of Transportation
Subchapter H. Right-Of-Way and Environment
Part 771. Environmental Impact and Related Procedures

§ 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 bearing 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 major new fixed guideway capital projects proposed for FTA funding 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:

(1) Prevent the granting of new approvals;

(2) Require the withdrawal of previous approvals; or

(3) Require the suspension of project activities; for any activity not 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.

23 C.F.R. § 774.1

Title 23. Highways
Chapter I. Federal Highway Administration, Department of Transportation
Subchapter H. Right-Of-Way and Environment
Part 774. Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites (Section 4(F))

§ 774.1. Purpose

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

23 C.F.R. § 774.3

Title 23. Highways
Chapter I. Federal Highway Administration, Department of Transportation
Subchapter H. Right-Of-Way and Environment
Part 774. Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites (Section 4(F))

§ 774.3. Section 4(f) approvals

The Administration may not approve the use, as defined in § 774.17, of Section 4(f) property unless a determination is made under paragraph (a) or (b) of this section.

(a) The Administration determines that:

(1) There is no feasible and prudent avoidance alternative, as defined in § 774.17, to the use of land from the property; and

(2) The action includes all possible planning, as defined in § 774.17, to minimize harm to the property resulting from such use; or

(b) The Administration determines that the use of the property, including any measure(s) to minimize harm (such as any avoidance, minimization, mitigation, or enhancement measures) committed to by the applicant, will have a de minimis impact, as defined in § 774.17, on the property.

(c) If the analysis in paragraph (a)(1) of this section concludes that there is no feasible and prudent avoidance alternative, then the Administration may approve, from among the remaining alternatives that use Section 4(f) property, only the alternative that:

(1) Causes the least overall harm in light of the statute's preservation purpose. The least overall harm is determined by balancing the following factors:

(i) The ability to mitigate adverse impacts to each Section 4(f) property (including any measures that result in benefits to the property);

(ii) The relative severity of the remaining harm, after mitigation, to the protected activities, attributes, or features that qualify each Section 4(f) property for protection;

(iii) The relative significance of each Section 4(f) property;

(iv) The views of the official(s) with jurisdiction over each Section 4(f) property;

(v) The degree to which each alternative meets the purpose and need for the project;

(vi) After reasonable mitigation, the magnitude of any adverse impacts to resources not protected by Section 4(f); and

(vii) Substantial differences in costs among the alternatives.

(2) The alternative selected must include all possible planning, as defined in § 774.17, to minimize harm to Section 4(f) property.

(d) Programmatic Section 4(f) evaluations are a time-saving procedural alternative to preparing individual Section 4(f) evaluations under paragraph (a) of this section for certain minor uses of Section 4(f) property. Programmatic Section 4(f) evaluations are developed by the Administration based on experience with a specific set of conditions that includes project type, degree of use and impact, and evaluation of avoidance alternatives. An approved programmatic Section 4(f) evaluation may be relied upon to cover a particular project only if the specific conditions in the programmatic evaluation are met

(1) The determination whether a programmatic Section 4(f) evaluation applies to the use of a specific Section 4(f) property shall be documented as specified in the applicable programmatic Section 4(f) evaluation.

(2) The Administration may develop additional programmatic Section 4(f) evaluations. Proposed new or revised programmatic Section 4(f) evaluations will be coordinated with the Department of Interior, Department of Agriculture, and Department of Housing and Urban Development, and published in the Federal Register for comment prior to being finalized. New or revised programmatic Section 4(f) evaluations shall be reviewed for legal sufficiency and approved by the Headquarters Office of the Administration.

(e) The coordination requirements in § 774.5 must be completed before the Administration may make Section 4(f) approvals under this section. Requirements for the documentation and timing of Section 4(f) approvals are located in §§ 774.7 and 774.9, respectively.

23 C.F.R. § 774.5

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Part 774. Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites (Section 4(F))

§ 774.5. Coordination

(a) Prior to making Section 4(f) approvals under § 774.3(a), the Section 4(f) evaluation shall be provided for coordination and comment to the official(s) with jurisdiction over the Section 4(f) resource and to the Department of the Interior, and as appropriate to the Department of Agriculture and the Department of Housing and Urban Development. The Administration shall provide a minimum of 45 days for receipt of comments. If comments are not received within 15 days after the comment deadline, the Administration may assume a lack of objection and proceed with the action.

(b) Prior to making de minimis impact determinations under § 774.3(b), the following coordination shall be undertaken:

(1) For historic properties:

(i) The consulting parties identified in accordance with 36 CFR part 800 must be consulted; and

(ii) The Administration must receive written concurrence from the pertinent State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO), and from the Advisory Council on Historic Preservation (ACHP) if participating in the consultation process, in a finding of “no adverse effect” or “no historic properties affected” in accordance with 36 CFR part 800. The Administration shall inform these officials of its intent to make a de minimis impact determination based on their concurrence in the finding of “no adverse effect” or “no historic properties affected.”

(iii) Public notice and comment, beyond that required by 36 CFR part 800, is not required.

(2) For parks, recreation areas, and wildlife and waterfowl refuges:

(i) Public notice and an opportunity for public review and comment concerning the effects on the protected activities, features, or attributes of the property must be provided. This requirement can be satisfied in conjunction with other public involvement procedures, such as a comment period provided on a NEPA document.

(ii) The Administration shall inform the official(s) with jurisdiction of its intent to make a de minimis impact finding. Following an opportunity for public review and comment as described in paragraph (b)(2)(i) of this section, the official(s) with jurisdiction over the Section 4(f) resource must concur in writing that the project will not adversely affect the activities, features, or attributes that make the property eligible for Section 4(f) protection. This concurrence may be combined with other comments on the project provided by the official(s).

(c) The application of a programmatic Section 4(f) evaluation to the use of a specific Section 4(f) property under § 774.3(d)(1) shall be coordinated as specified in the applicable programmatic Section 4(f) evaluation.

(d) When Federal encumbrances on Section 4(f) property are identified, coordination with the appropriate Federal agency is required to ascertain the agency's position on the proposed impact, as well as to determine if any other Federal requirements may apply to converting the Section 4(f) land to a different function. Any such requirements must be satisfied, independent of the Section 4(f) approval.

23 C.F.R. § 774.7

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§ 774.7. Documentation

(a) A Section 4(f) evaluation prepared under § 774.3(a) shall include sufficient supporting documentation to demonstrate why there is no feasible and prudent avoidance alternative and shall summarize the results of all possible planning to minimize harm to the Section 4(f) property.

(b) A de minimis impact determination under § 774.3(b) shall include sufficient supporting documentation to demonstrate that the impacts, after avoidance, minimization, mitigation, or enhancement measures are taken into account, are de minimis as defined in § 774.17; and that the coordination required in § 774.5(b) has been completed.

(c) If there is no feasible and prudent avoidance alternative the Administration may approve only the alternative that causes the least overall harm in accordance with § 774.3(c). This analysis must be documented in the Section 4(f) evaluation.

(d) The Administration shall review all Section 4(f) approvals under §§ 774.3(a) and 774.3(c) for legal sufficiency.

(e) A Section 4(f) approval may involve different levels of detail where the Section 4(f) involvement is addressed in a tiered EIS under § 771.111(g) of this chapter.

(1) When the first-tier, broad-scale EIS is prepared, the detailed information necessary to complete the Section 4(f) approval may not be available at that stage in the development of the action. In such cases, the documentation should address the potential impacts that a proposed action will have on Section 4(f) property and whether those impacts could have a bearing on the decision to be made. A preliminary Section 4(f) approval may be made at this time as to whether the impacts resulting from the use of a Section 4(f) property are de minimis or whether there are feasible and prudent avoidance alternatives. This

preliminary approval shall include 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 may 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 Section 4(f) approval is then incorporated into the first-tier EIS.

(2) The Section 4(f) approval will be finalized in the second-tier study. If no new Section 4(f) use, other than a de minimis impact, is identified in the second-tier study and if all possible planning to minimize harm has occurred, then the second-tier Section 4(f) approval may finalize the preliminary approval by reference to the first-tier documentation. Re-evaluation of the preliminary Section 4(f) approval is only needed to the extent that new or more detailed information available at the second-tier stage raises new Section 4(f) concerns not already considered.

(3) The final Section 4(f) approval may be made in the second-tier CE, EA, final EIS, ROD or FONSI.

(f) In accordance with §§ 771.105(a) and 771.133 of this chapter, the documentation supporting a Section 4(f) approval should be included in the EIS, EA, or for a project classified as a CE, in a separate document. If the Section 4(f) documentation cannot be included in the NEPA document, then it shall be presented in a separate document. The Section 4(f) documentation shall be developed by the applicant in cooperation with the Administration.

23 C.F.R. § 774.9

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§ 774.9. Timing

(a) The potential use of land from a Section 4(f) property shall be evaluated as early as practicable in the development of the action when alternatives to the proposed action are under study.

(b) Except as provided in paragraph (c) of this section, for actions processed with EISs the Administration will make the Section 4(f) approval either in 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 notification by the Administration of Section 4(f) approval.

(c) After the CE, FONSI, or ROD has been processed, a separate Section 4(f) approval will be required, except as provided in § 774.13, if:

(1) A proposed modification of the alignment or design would require the use of Section 4(f) property; or

(2) The Administration determines that Section 4(f) applies to the use of a property; or

(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) property used, a substantial increase in the adverse impacts to Section 4(f) property, or a substantial reduction in the measures to minimize harm.

(d) A separate Section 4(f) approval required under paragraph (c) of this section will not necessarily require the preparation of a new or supplemental NEPA

document. If a new or supplemental NEPA document is also required under § 771.130 of this chapter, then it should include the documentation supporting the separate Section 4(f) approval. Where a separate Section 4(f) approval is required, any activity not directly affected by the separate Section 4(f) approval can proceed during the analysis, consistent with § 771.130(f) of this chapter.

(e) Section 4(f) may apply to archeological sites discovered during construction, as set forth in § 774.11(f). In such cases, the Section 4(f) process will be expedited and any required evaluation of feasible and prudent avoidance 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.

23 C.F.R. § 774.11

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Part 774. Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites (Section 4(F))

§ 774.11. Applicability

(a) The Administration will determine the applicability of Section 4(f) in accordance with this part.

(b) When another Federal agency is the Federal lead agency for the NEPA process, the Administration shall make any required Section 4(f) approvals unless the Federal lead agency is another U.S. DOT agency.

(c) Consideration under Section 4(f) is not required when the official(s) with jurisdiction over a park, recreation area, or wildlife and waterfowl refuge determine that the property, considered in its entirety, is not significant. In the absence of such a determination, the Section 4(f) property will be presumed to be significant. The Administration will review a determination that a park, recreation area, or wildlife and waterfowl refuge is not significant 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 refuge purposes. The determination of which lands so function or are so designated, and the significance of those lands, shall be made by the official(s) with jurisdiction over the Section 4(f) resource. The Administration will review this determination to assure its reasonableness.

(e) In determining the applicability of Section 4(f) to historic sites, the Administration, in cooperation with the applicant, will consult with the official(s) with jurisdiction to identify all properties on or eligible for the National Register of Historic Places (National Register). The Section 4(f) requirements apply to historic

sites on or eligible for the National Register unless the Administration determines that an exception under § 774.13 applies.

(1) The Section 4(f) requirements apply only to historic sites on or eligible for the National Register unless the Administration determines that the application of Section 4(f) is otherwise appropriate.

(2) The Interstate System is not considered to be a historic site subject to Section 4(f), with the exception of those individual elements of the Interstate System formally identified by FHWA for Section 4(f) protection on the basis of national or exceptional historic significance.

(f) 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 § 774.13(b).

(g) Section 4(f) applies to those portions of federally designated Wild and Scenic Rivers that are otherwise eligible as historic sites, or that are publicly owned and function as, or are designated in a management plan as, a significant park, recreation area, or wildlife and waterfowl refuge. All other applicable requirements of the Wild and Scenic Rivers Act, 16 U.S.C. 1271–1287, must be satisfied, independent of the Section 4(f) approval.

(h) When a property formally reserved for a future transportation facility temporarily functions for park, recreation, or wildlife and waterfowl refuge purposes in the interim, the interim activity, regardless of duration, will not subject the property to Section 4(f).

(i) When a property is formally reserved for a future transportation facility before or at the same time a park, recreation area, or wildlife and waterfowl refuge is established and concurrent or joint planning or development of the transportation facility and the Section 4(f) resource occurs, then any resulting impacts of the transportation facility will not be considered a use as defined in § 774.17. Examples of such concurrent or joint planning or development include, but are not limited to:

(1) Designation or donation of property for the specific purpose of such concurrent development by the entity with jurisdiction or ownership of the property for both the potential transportation facility and the Section 4(f) property; or

(2) Designation, donation, planning, or development of property by two or more governmental agencies with jurisdiction for the potential transportation facility and the Section 4(f) property, in consultation with each other.

23 C.F.R. § 774.13

Title 23. Highways
Chapter I. Federal Highway Administration, Department of Transportation
Subchapter H. Right-Of-Way and Environment
Part 774. Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites (Section 4(F))

§ 774.13. Exceptions

The Administration has identified various exceptions to the requirement for Section 4(f) approval. These exceptions include, but are not limited to:

(a) Restoration, rehabilitation, or maintenance of transportation facilities that are on or eligible for the National Register when:

(1) The Administration concludes, as a result of the consultation under 36 CFR 800.5, that 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 official(s) with jurisdiction over the Section 4(f) resource have not objected to the Administration conclusion in paragraph (a)(1) of this section.

(b) Archeological sites that are on or eligible for the National Register when:

(1) The Administration concludes 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 and where the Administration decides, with agreement of the official(s) with jurisdiction, not to recover the resource; and

(2) The official(s) with jurisdiction over the Section 4(f) resource have been consulted and have not objected to the Administration finding in paragraph (b)(1) of this section.

(c) Designations of park and recreation lands, wildlife and waterfowl refuges, and historic sites that are made, or determinations of significance that are changed, late in the development of a proposed action. With the exception of the treatment of archeological resources in § 774.9(e), the Administration may permit a project to

proceed without consideration under Section 4(f) if the property interest in the Section 4(f) land 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. However, if it is reasonably foreseeable that a property would qualify as eligible for the National Register prior to the start of construction, then the property should be treated as a historic site for the purposes of this section.

(d) Temporary occupancies of land that are so minimal as to not constitute a use within the meaning of Section 4(f). The following conditions must be satisfied:

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

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

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

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

(5) There must be documented agreement of the official(s) with jurisdiction over the Section 4(f) resource regarding the above conditions.

(e) Park road or parkway projects under 23 U.S.C. 204.

(f) Certain trails, paths, bikeways, and sidewalks, in the following circumstances:

(1) Trail-related projects funded under the Recreational Trails Program, 23 U.S.C. 206(h)(2);

(2) National Historic Trails and the Continental Divide National Scenic Trail, designated under the National Trails System Act, 16 U.S.C. 1241–1251, with the exception of those trail segments that are historic sites as defined in § 774.17;

(3) Trails, paths, bikeways, and sidewalks that occupy a transportation facility right-of-way without limitation to any specific location within that right-of-way, so long as the continuity of the trail, path, bikeway, or sidewalk is maintained; and

(4) Trails, paths, bikeways, and sidewalks that are part of the local transportation system and which function primarily for transportation.

(g) Transportation enhancement projects and mitigation activities, where:

(1) The use of the Section 4(f) property is solely for the purpose of preserving or enhancing an activity, feature, or attribute that qualifies the property for Section 4(f) protection; and

(2) The official(s) with jurisdiction over the Section 4(f) resource agrees in writing to paragraph (g)(1) of this section.

23 C.F.R. § 774.15

Title 23. Highways
Chapter I. Federal Highway Administration, Department of Transportation
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Part 774. Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites (Section 4(F))

§ 774.15. Constructive use determinations

(a) A constructive use occurs when the transportation project does not incorporate land from a Section 4(f) property, but the project's proximity impacts are so severe that the protected activities, features, or attributes that qualify the property for protection under Section 4(f) are substantially impaired. Substantial impairment occurs only when the protected activities, features, or attributes of the property are substantially diminished.

(b) If the project results in a constructive use of a nearby Section 4(f) property, the Administration shall evaluate that use in accordance with § 774.3(a).

(c) The Administration shall determine when there is a constructive use, but the Administration is not required to document each determination that a project would not result in a constructive use of a nearby Section 4(f) property. However, such documentation may be prepared at the discretion of the Administration.

(d) When a constructive use determination is made, it will be based upon the following:

(1) Identification of the current activities, features, or attributes of the property which qualify for protection under Section 4(f) and which may be sensitive to proximity impacts;

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

(3) Consultation, on the foregoing identification and analysis, with the official(s) with jurisdiction over the Section 4(f) property.

(e) The Administration has reviewed the following situations and determined that a constructive use occurs when:

(1) The projected noise level increase attributable to the project substantially interferes with the use and enjoyment of a noise-sensitive facility of a property protected by Section 4(f), such as:

(i) Hearing the performances at an outdoor amphitheater;

(ii) Sleeping in the sleeping area of a campground;

(iii) Enjoyment of a historic site where a quiet setting is a generally recognized feature or attribute of the site's significance;

(iv) Enjoyment of an urban park where serenity and quiet are significant attributes; or

(v) Viewing wildlife in an area of a wildlife and waterfowl refuge intended for such viewing.

(2) The proximity of the proposed project substantially impairs esthetic features or attributes of a property protected by Section 4(f), where such features or attributes are considered important contributing elements to the value of the property. Examples of substantial impairment to visual or esthetic qualities would be the location of a proposed transportation facility in such proximity that it obstructs or eliminates the primary views of an architecturally significant historical building, or substantially detracts from the setting of a Section 4(f) property which derives its value in substantial part due to its setting;

(3) The project results in a restriction of access which substantially diminishes the utility of a significant publicly owned park, recreation area, or a historic site;

(4) The vibration impact from construction or operation of the project substantially impairs the use of a Section 4(f) property, such as projected vibration levels that are great enough to physically damage a historic building or substantially diminish the utility of the building, unless the damage is

repaired and fully restored consistent with the Secretary of the Interior's Standards for the Treatment of Historic Properties, i.e., the integrity of the contributing features must be returned to a condition which is substantially similar to that which existed prior to the project; or

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

(f) The Administration has reviewed the following situations and determined that a constructive use does not occur when:

(1) Compliance with the requirements of 36 CFR 800.5 for proximity impacts of the proposed action, on a site listed on or eligible for the National Register, results in an agreement of “no historic properties affected” or “no adverse effect;”

(2) The impact of projected traffic noise levels of the proposed highway project on a noise-sensitive activity do not exceed the FHWA noise abatement criteria as contained in Table 1 in part 772 of this chapter, or the projected operational noise levels of the proposed transit project do not exceed the noise impact criteria for a Section 4(f) activity in the FTA guidelines for transit noise and vibration impact assessment;

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

(4) There are proximity impacts to a Section 4(f) property, but a governmental agency's right-of-way acquisition or adoption of project location, or the Administration's approval of a final environmental document, established the location for the proposed transportation project before the designation, establishment, or change in the significance of the property. However, if it is reasonably foreseeable that a property would qualify as eligible for the National

Register prior to the start of construction, then the property should be treated as a historic site for the purposes of this section; or

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

(6) Proximity impacts will be mitigated to a condition equivalent to, or better than, that which would occur if the project were not built, as determined after consultation with the official(s) with jurisdiction;

(7) Change in accessibility will not substantially diminish the utilization of the Section 4(f) property; or

(8) Vibration levels from project construction activities are mitigated, through advance planning and monitoring of the activities, to levels that do not cause a substantial impairment of protected activities, features, or attributes of the Section 4(f) property.

23 C.F.R. § 774.17

Title 23. Highways
Chapter I. Federal Highway Administration, Department of Transportation
Subchapter H. Right-Of-Way and Environment
Part 774. Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites (Section 4(F))

§ 774.17. Definitions

The definitions contained in 23 U.S.C. 101(a) are applicable to this part. In addition, the following definitions apply:

Administration. The FHWA or FTA, whichever is making the approval for the transportation program or project at issue. A reference herein to the Administration means the State when the State is functioning as the FHWA or FTA in carrying out responsibilities delegated or assigned to the State in accordance with 23 U.S.C. 325, 326, 327, or other applicable law.

All possible planning. All possible planning means that all reasonable measures identified in the Section 4(f) evaluation to minimize harm or mitigate for adverse impacts and effects must be included in the project.

(1) With regard to public parks, recreation areas, and wildlife and waterfowl refuges, the measures may include (but are not limited to): design modifications or design goals; replacement of land or facilities of comparable value and function; or monetary compensation to enhance the remaining property or to mitigate the adverse impacts of the project in other ways.

(2) With regard to historic sites, the measures normally serve to preserve the historic activities, features, or attributes of the site as agreed by the Administration and the official(s) with jurisdiction over the Section 4(f) resource in accordance with the consultation process under 36 CFR part 800.

(3) In evaluating the reasonableness of measures to minimize harm under § 774.3(a)(2), the Administration will consider the preservation purpose of the statute and:

(i) The views of the official(s) with jurisdiction over the Section 4(f) property;

(ii) Whether the cost of the measures is a reasonable public expenditure in light of the adverse impacts of the project on the Section 4(f) property and the benefits of the measure to the property, in accordance with § 771.105(d) of this chapter; and

(iii) Any impacts or benefits of the measures to communities or environmental resources outside of the Section 4(f) property.

(4) All possible planning does not require analysis of feasible and prudent avoidance alternatives, since such analysis will have already occurred in the context of searching for feasible and prudent alternatives that avoid Section 4(f) properties altogether under § 774.3(a)(1), or is not necessary in the case of a de minimis impact determination under § 774.3(b).

(5) A de minimis impact determination under § 774.3(b) subsumes the requirement for all possible planning to minimize harm by reducing the impacts on the Section 4(f) property to a de minimis level.

Applicant. The Federal, State, or local government authority, proposing a transportation project, that the Administration works with to conduct environmental studies and prepare environmental documents. For transportation actions implemented by the Federal government on Federal lands, the Administration or the Federal land management agency may take on the responsibilities of the applicant described herein.

CE. Refers to a Categorical Exclusion, which denotes an action with no individual or cumulative significant environmental effect pursuant to 40 CFR 1508.4 and § 771.117 of this chapter; unusual circumstances are taken into account in making categorical exclusion determinations.

De minimis impact. (1) For historic sites, de minimis impact means that the Administration has determined, in accordance with 36 CFR part 800 that no historic property is affected by the project or that the project will have “no adverse effect” on the historic property in question.

(2) For parks, recreation areas, and wildlife and waterfowl refuges, a de minimis impact is one that will not adversely affect the features, attributes, or activities qualifying the property for protection under Section 4(f).

EA. Refers to an Environmental Assessment, which is a document prepared pursuant to 40 CFR parts 1500–1508 and § 771.119 of this title for a proposed project that is not categorically excluded but for which an EIS is not clearly required.

EIS. Refers to an Environmental Impact Statement, which is a document prepared pursuant to NEPA, 40 CFR parts 1500–1508, and §§ 771.123 and 771.125 of this chapter for a proposed project that is likely to cause significant impacts on the environment.

Feasible and prudent avoidance alternative. (1) A feasible and prudent avoidance alternative avoids using Section 4(f) property and does not cause other severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property. In assessing the importance of protecting the Section 4(f) property, it is appropriate to consider the relative value of the resource to the preservation purpose of the statute.

(2) An alternative is not feasible if it cannot be built as a matter of sound engineering judgment.

(3) An alternative is not prudent if:

(i) It compromises the project to a degree that it is unreasonable to proceed with the project in light of its stated purpose and need;

(ii) It results in unacceptable safety or operational problems;

(iii) After reasonable mitigation, it still causes:

(A) Severe social, economic, or environmental impacts;

(B) Severe disruption to established communities;

(C) Severe disproportionate impacts to minority or low income populations; or

(D) Severe impacts to environmental resources protected under other Federal statutes;

(iv) It results in additional construction, maintenance, or operational costs of an extraordinary magnitude;

(v) It causes other unique problems or unusual factors; or

(vi) It involves multiple factors in paragraphs (3)(i) through (3)(v) of this definition, that while individually minor, cumulatively cause unique problems or impacts of extraordinary magnitude.

FONSI. Refers to a Finding of No Significant Impact prepared pursuant to 40 CFR 1508.13 and § 771.121 of this chapter.

Historic site. For purposes of this part, the term "historic site" includes any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization that are included in, or are eligible for inclusion in, the National Register.

Official(s) with jurisdiction. (1) In the case of historic properties, the official with jurisdiction is the SHPO for the State wherein the property is located or, if the property is located on tribal land, the THPO. If the property is located on tribal land but the Indian tribe has not assumed the responsibilities of the SHPO as provided for in the National Historic Preservation Act, then a representative designated by such Indian tribe shall be recognized as an official with jurisdiction in addition to the SHPO. When the ACHP is involved in a consultation concerning a property under Section 106 of the NHPA, the ACHP is also an official with jurisdiction over that resource for purposes of this part. When the Section 4(f) property is a National Historic Landmark, the National Park Service is also an official with jurisdiction over that resource for purposes of this part.

(2) In the case of public parks, recreation areas, and wildlife and waterfowl refuges, the official(s) with jurisdiction are the official(s) of the agency or agencies that own or administer the property in question and who are empowered to represent the agency on matters related to the property.

(3) In the case of portions of Wild and Scenic Rivers to which Section 4(f) applies, the official(s) with jurisdiction are the official(s) of the Federal agency or agencies that own or administer the affected portion of the river corridor in question. For State administered, federally designated rivers (section 2(a)(ii) of the Wild and Scenic Rivers Act, 16 U.S.C. 1273(a)(ii)), the officials with jurisdiction include both the State agency designated by the respective Governor and the Secretary of the Interior.

ROD. Refers to a Record of Decision prepared pursuant to 40 CFR 1505.2 and § 771.127 of this chapter.

Section 4(f) evaluation. Refers to the documentation prepared to support the granting of a Section 4(f) approval under § 774.3(a), unless preceded by the word "programmatic." A "programmatic Section 4(f) evaluation" is the documentation prepared pursuant to § 774.3(d) that authorizes subsequent project-level Section 4(f) approvals as described therein.

Section 4(f) Property. Section 4(f) property means publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance.

Use. Except as set forth in §§ 774.11 and 774.13, a "use" of Section 4(f) property occurs:

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

(2) When there is a temporary occupancy of land that is adverse in terms of the statute's preservation purpose as determined by the criteria in § 774.13(d); or

(3) When there is a constructive use of a Section 4(f) property as determined by the criteria in § 774.15.

not be considered to be a Federal action subject to review under NEPA.

§ 450.338 Phase-in of new requirements.

(a) Metropolitan transportation plans and TIPs adopted or approved prior to July 1, 2007 may be developed using the TEA–21 requirements or the provisions and requirements of this part.

(b) For metropolitan transportation plans and TIPs that are developed under TEA–21 requirements prior to July 1, 2007, the FHWA/FTA action (*i.e.*, conformity determinations and STIP approvals) must be completed no later than June 30, 2007. For metropolitan transportation plans in attainment areas that are developed under TEA–21 requirements prior to July 1, 2007, the MPO adoption action must be completed no later than June 30, 2007. If these actions are completed on or after July 1, 2007, the provisions and requirements of this part shall take effect, regardless of when the metropolitan transportation plan or TIP were developed.

(c) On and after July 1, 2007, the FHWA and the FTA will take action on a new TIP developed under the provisions of this part, even if the MPO has not yet adopted a new metropolitan transportation plan under the provisions of this part, as long as the underlying transportation planning process is consistent with the requirements in the SAFETEA–LU.

(d) The applicable action (see paragraph (b) of this section) on any amendments or updates to metropolitan transportation plans and TIPs on or after July 1, 2007, shall be based on the provisions and requirements of this part. However, administrative modifications may be made to the metropolitan transportation plan or TIP on or after July 1, 2007 in the absence of meeting the provisions and requirements of this part.

(e) For new TMAs, the congestion management process described in § 450.320 shall be implemented within 18 months of the designation of a new TMA.

APPENDIX A TO PART 450—LINKING THE TRANSPORTATION PLANNING AND NEPA PROCESSES

Background and Overview:

This Appendix provides additional information to explain the linkage between the transportation planning and project development/National Environmental Policy Act (NEPA) processes. It is intended to be nonbinding and should not be construed as a rule of general applicability.

For 40 years, the Congress has directed that federally-funded highway and transit projects must flow from metropolitan and statewide transportation planning processes (pursuant to 23 U.S.C. 134–135 and 49 U.S.C. 5303–5306). Over the years, the Congress has refined and strengthened the transportation planning process as the foundation for project decisions, emphasizing public involvement, consideration of environmental and other factors, and a Federal role that oversees the transportation planning process but does not second-guess the content of transportation plans and programs.

Despite this statutory emphasis on transportation planning, the environmental analyses produced to meet the requirements of the NEPA of 1969 (42 U.S.C. 4231 *et seq.*) have often been conducted *de novo*, disconnected from the analyses used to develop long-range transportation plans, statewide and metropolitan Transportation Improvement Programs (STIPs/TIPs), or planning-level corridor/subarea/feasibility studies. When the NEPA and transportation planning processes are not well coordinated, the NEPA process may lead to the development of information that is more appropriately developed in the planning process, resulting in duplication of work and delays in transportation improvements.

The purpose of this Appendix is to change this culture, by supporting congressional intent that statewide and metropolitan transportation planning should be the foundation for highway and transit project decisions. This Appendix was crafted to recognize that transportation planning processes vary across the country. This document provides details on how information, analysis, and products from transportation planning can be incorporated into and relied upon in NEPA documents under existing laws, regardless of when the Notice of Intent has been published. This Appendix presents environmental review as a continuum of sequential study, refinement, and expansion performed in transportation planning and during project development/NEPA, with information developed and conclusions drawn in early stages utilized in subsequent (and more detailed) review stages.

The information below is intended for use hy State departments of transportation

(State DOTs), metropolitan planning organizations (MPOs), and public transportation operators to clarify the circumstances under which transportation planning level choices and analyses can be adopted or incorporated into the process required by NEPA. Additionally, the FHWA and the FTA will work with Federal environmental, regulatory, and resource agencies to incorporate the principles of this Appendix in their day-to-day NEPA policies and procedures related to their involvement in highway and transit projects.

This Appendix does not extend NEPA requirements to transportation plans and programs. The Transportation Efficiency Act for the 21st Century (TEA–21) and the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) specifically exempted transportation plans and programs from NEPA review. Therefore, initiating the NEPA process as part of, or concurrently with, a transportation planning study does not subject transportation plans and programs to NEPA.

Implementation of this Appendix by States, MPOs, and public transportation operators is voluntary. The degree to which studies, analyses, or conclusions from the transportation planning process can be incorporated into the project development/NEPA processes will depend upon how well they meet certain standards established by NEPA regulations and guidance. While some transportation planning processes already meet these standards, others will need some modification.

The remainder of this Appendix document utilizes a "Question and Answer" format, organized into three primary categories ("Procedural Issues," "Substantive Issues," and "Administrative Issues").

I. Procedural Issues:

1. In what format should the transportation planning information be included?

To he included in the NEPA process, work from the transportation planning process must be documented in a form that can be appended to the NEPA document or incorporated by reference. Documents may be incorporated by reference if they are readily available so as to not impede agency or public review of the action. Any document incorporated by reference must be "reasonably available for inspection by potentially interested persons within the time allowed for comment." Incorporated materials must be cited in the NEPA document and their contents briefly described, so that the reader understands why the document is cited and knows where to look for further information. To the extent possible, the documentation should be in a form such as official actions by the MPO, State DOT, or public transportation operator and/or correspondence within and among the organizations involved in the transportation planning process.

2. What is a reasonable level of detail for a planning product that is intended to be used in a NEPA document? How does this level of detail compare to what is considered a full NEPA analysis?

For purposes of transportation planning alone, a planning-level analysis does not need to rise to the level of detail required in the NEPA process. Rather, it needs to be accurate and up-to-date, and should adequately support recommended improvements in the statewide or metropolitan long-range transportation plan. The SAFETEA–LU requires transportation planning processes to focus on setting a context and following acceptable procedures. For example, the SAFETEA–LU requires a "discussion of the types of potential environmental mitigation activities" and potential areas for their implementation, rather than details on specific strategies. The SAFETEA–LU also emphasizes consultation with Federal, State, and Tribal land management, wildlife, and regulatory agencies.

However, the Environmental Assessment (EA) or Environmental Impact Statement (EIS) ultimately will be judged by the standards applicable under the NEPA regulations and guidance from the Council on Environmental Quality (CEQ). To the extent the information incorporated from the transportation planning process, standing alone, does not contain all of the information or analysis required by NEPA, then it will need to be supplemented by other information contained in the EIS or EA that would, in conjunction with the information from the plan, collectively meet the requirements of NEPA. The intent is not to require NEPA studies in the transportation planning process. As an option, the NEPA analyses prepared for project development can be integrated with transportation planning studies (see the response to Question 9 for additional information).

3. What type and extent of involvement from Federal, Tribal, State, and local environmental, regulatory, and resource agencies is needed in the transportation planning process in order for planning-level decisions to be more readily accepted in the NEPA process?

Sections 3005, 3006, and 6001 of the SAFETEA–LU established formal consultation requirements for MPOs and State DOTs to employ with environmental, regulatory, and resource agencies in the development of long-range transportation plans. For example, metropolitan transportation plans now "shall include a discussion of the types of potential environmental mitigation activities and potential areas to carry out these activities, including activities that may have the greatest potential to restore and maintain the environmental functions affected by the

[transportation] plan," and that these planning-level discussions "shall be developed in consultation with Federal, State, and Tribal land management, wildlife, and regulatory agencies." In addition, MPOs "shall consult, as appropriate, with State and local agencies responsible for land use management, natural resources, environmental protection, conservation, and historic preservation concerning the development of a long-range transportation plan," and that this consultation "shall involve, as appropriate, comparison of transportation plans with State conservation plans or maps, if available, or comparison of transportation plans to inventories of natural or historic resources, if available." Similar SAFETEA-LU language addresses the development of the long-range statewide transportation plan, with the addition of Tribal conservation plans or maps to this planning-level "comparison."

In addition, section 6002 of the SAFETEA-LU established several mechanisms for increased efficiency in environmental reviews for project decision-making. For example, the term "lead agency" collectively means the U. S. Department of Transportation and a State or local governmental entity serving as a joint lead agency for the NEPA process. In addition, the lead agency is responsible for inviting and designating "participating agencies" (*i.e.*, other Federal or non-Federal agencies that may have an interest in the proposed project). Any Federal agency that is invited by the lead agency to participate in the environmental review process for a project shall be designated as a participating agency by the lead agency unless the invited agency informs the lead agency, in writing, by the deadline specified in the invitation that the invited agency:

(a) Has no jurisdiction or authority with respect to the project; (b) has no expertise or information relevant to the project; and (c) does not intend to submit comments on the project.

Past successful examples of using transportation planning products in NEPA analysis are based on early and continuous involvement of environmental, regulatory, and resource agencies. Without this early coordination, environmental, regulatory, and resource agencies are more likely to expect decisions made or analyses conducted in the transportation planning process to be revisited during the NEPA process. Early participation in transportation planning provides environmental, regulatory, and resource agencies better insight into the needs and objectives of the locality. Additionally, early participation provides an important opportunity for environmental, regulatory, and resource agency concerns to be identified and addressed early in the process, such as those related to permit applications. Moreover, Federal, Tribal, State, and local environmental, regulatory, and resource agencies are able to share data on particular resources, which can play a critical role in determining the feasibility of a transportation solution with respect to environmental impacts. The use of other agency planning outputs can result in a transportation project that could support multiple goals (transportation, environmental, and community). Further, planning decisions by these other agencies may have impacts on long-range transportation plans and/or the STIP/TIP, thereby providing important input to the transportation planning process and advancing integrated decision-making.

4. What is the procedure for using decisions or analyses from the transportation planning process?

The lead agencies jointly decide, and must agree, on what processes and consultation techniques are used to determine the transportation planning products that will be incorporated into the NEPA process. At a minimum, a robust scoping/early coordination process (which explains to Federal and State environmental, regulatory, and resource agencies and the public the information and/or analyses utilized to develop the planning products, how the purpose and need was developed and refined, and how the design concept and scope were determined) should play a critical role in leading to informed decisions by the lead agencies on the snitability of the transportation planning information, analyses, documents, and decisions for use in the NEPA process. As part of a rigorous scoping/early coordination process, the FHWA and the FTA should ensure that the transportation planning results are appropriately documented, shared, and used.

5. To what extent can the FHWA/FTA provide up-front assurance that decisions and additional investments made in the transportation planning process will allow planning-level decisions and analyses to be used in the NEPA process?

There are no guarantees. However, the potential is greatly improved for transportation planning processes that address the "3-C" planning principles (comprehensive, cooperative, and continuous); incorporate the intent of NEPA through the consideration of natural, physical, and social effects; involve environmental, regulatory, and resource agencies; thoroughly document the transportation planning process information, analysis, and decision; and vet the planning results through the applicable public involvement processes.

6. What considerations will the FHWA/FTA take into account in their review of transportation planning products for acceptance in project development/NEPA?

The FHWA and the FTA will give deference to decisions resulting from the transportation planning process if the FHWA and FTA determine that the planning process is

consistent with the "3–C" planning principles and when the planning study process, alternatives considered, and resulting decisions have a rational basis that is thoroughly documented and vetted through the applicable public involvement processes. Moreover, any applicable program-specific requirements (e.g., those of the Congestion Mitigation and Air Quality Improvement Program or the FTA's Capital Investment Grant program) also must be met.

The NEPA requires that the FHWA and the FTA be able to stand behind the overall soundness and credibility of analyses conducted and decisions made during the transportation planning process if they are incorporated into a NEPA document. For example, if systems-level or other broad objectives or choices from the transportation plan are incorporated into the purpose and need statement for a NEPA document, the FHWA and the FTA should not revisit whether these are the best objectives or choices among other options. Rather, the FHWA and the FTA review would include making sure that objectives or choices derived from the transportation plan were: Based on transportation planning factors established by Federal law; reflect a credible and articulated planning rationale; founded on reliable data; and developed through transportation planning processes meeting FHWA and FTA statutory and regulatory requirements. In addition, the basis for the goals and choices must be documented and included in the NEPA document. The FHWA/FTA reviewers do not need to review whether assumptions or analytical methods used in the studies are the best available, but, instead, need to assure that such assumptions or analytical methods are reasonable, scientifically acceptable, and consistent with goals, objectives, and policies set forth in long-range transportation plans. This review would include determining whether: (a) Assumptions have a rational basis and are up-to-date and (b) data, analytical methods, and modeling techniques are reliable, defensible, reasonably current, and meet data quality requirements.

II. Suhstantive Issues

General Issues To Be Considered:

7. What should be considered in order to rely upon transportation planning studies in NEPA?

The following questions should he answered prior to accepting studies conducted during the transportation planning process for use in NEPA. While not a "checklist," these questions are intended to guide the practitioner's analysis of the planning products:

- How much time has passed since the planning studies and corresponding decisions were made?
- Were the future year policy assumptions used in the transportation planning process related to land use, economic development, transportation costs, and network expansion consistent with those to be used in the NEPA process?
- Is the information still relevant/valid?
- What changes have occurred in the area since the study was completed?
- Is the information in a format that can be appended to an environmental document or reformatted to do so?
- Are the analyses in a planning-level report or document based on data, analytical methods, and modeling techniques that are reliable, defensible, and consistent with those used in other regional transportation studies and project development activities?
- Were the FHWA and FTA, other agencies, and the public involved in the relevant planning analysis and the corresponding planning decisions?
- Were the planning products available to other agencies and the public during NEPA scoping?
- During NEPA scoping, was a clear connection between the decisions made in planning and those to be made during the project development stage explained to the public and others? What was the response?
- Are natural resource and land use plans being informed by transportation planning products, and vice versa?

Purpose and Need:

8. How can transportation planning be used to shape a project's purpose and need in the NEPA process?

A sound transportation planning process is the primary source of the project purpose and need. Through transportation planning, State and local governments, with involvement of stakeholders and the public, establish a vision for the region's future transportation system, define transportation goals and objectives for realizing that vision, decide which needs to address, and determine the timeframe for addressing these issues. The transportation planning process also provides a potential forum to define a project's purpose and need by framing the scope of the problem to he addressed by a proposed project. This scope may be further refined during the transportation planning process as more information about the transportation need is collected and consultation with the public and other stakeholders clarifies other issues and goals for the region.

23 U.S.C. 139(f), as amended hy the SAFETEA–LU Section 6002, provides additional focus regarding the definition of the purpose and need and objectives. For example, the lead agency, as early as practicable during the environmental review process, shall provide an opportunity for involvement by participating agencies and the public in defining the purpose and need for a project.

The statement of purpose and need shall include a clear statement of the objectives that the proposed action is intended to achieve, which may include: (a) Achieving a transportation objective identified in an applicable statewide or metropolitan transportation plan; (b) supporting land use, economic development, or growth objectives established in applicable Federal, State, local, or Tribal plans; and (c) serving national defense, national security, or other national objectives, as established in Federal laws, plans, or policies.

The transportation planning process can be utilized to develop the purpose and need in the following ways:

(a) Goals and objectives from the transportation planning process may be part of the project's purpose and need statement;

(b) A general travel corridor or general mode or modes (e.g., highway, transit, or a highway/transit combination) resulting from planning analyses may be part of the project's purpose and need statement;

(c) If the financial plan for a metropolitan transportation plan indicates that funding for a specific project will require special funding sources (e.g., tolls or public-private financing), such information may be included in the purpose and need statement; or

(d) The results of analyses from management systems (e.g., congestion, pavement, bridge, and/or safety) may shape the purpose and need statement.

The use of these planning-level goals and choices must be appropriately explained during NEPA scoping and in the NEPA document.

Consistent with NEPA, the purpose and need statement should be a statement of a transportation problem, not a specific solution. However, the purpose and need statement should be specific enough to generate alternatives that may potentially yield real solutions to the problem at-hand. A purpose and need statement that yields only one alternative may indicate a purpose and need that is too narrowly defined.

Short of a fully integrated transportation decisionmaking process, many State DOTs develop information for their purpose and need statements when implementing interagency NEPA/Section 404 process merger agreements. These agreements may need to be expanded to include commitments to share and utilize transportation planning products when developing a project's purpose and need.

9. Under what conditions can the NEPA process be initiated in conjunction with transportation planning studies?

The NEPA process may be initiated in conjunction with transportation planning studies in a number of ways. A common method is the "tiered EIS," in which the first-tier EIS evaluates general travel corridors, modes, and/or packages of projects at a planning level of detail, leading to the refinement of purpose and need and, ideally, selection of the design concept and scope for a project or series of projects. Subsequently, second-tier NEPA review(s) of the resulting projects would be performed in the usual way. The first-tier EIS uses the NEPA process as a tool to involve environmental, regulatory, and resource agencies and the public in the planning decisions, as well as to ensure the appropriate consideration of environmental factors in these planning decisions.

Corridor or subarea analyses/studies are another option when the long-range transportation plan leaves open the possibility of multiple approaches to fulfill its goals and objectives. In such cases, the formal NEPA process could be initiated through publication of a NOI in conjunction with a corridor or subarea planning study. Similarly, some public transportation operators developing major capital projects perform the mandatory planning Alternatives Analysis required for funding under FTA's Capital Investment Grant program [49 U.S.C. 5309(d) and (e)] within the NEPA process and combine the planning Alternatives Analysis with the draft EIS.

Alternatives:

10. In the context of this Appendix, what is the meaning of the term "alternatives"?

This Appendix uses the term "alternatives" as specified in the NEPA regulations (40 CFR 1502.14), where it is defined in its broadest sense to include everything from major modal alternatives and location alternatives to minor design changes that would mitigate adverse impacts. This Appendix does not use the term as it is used in many other contexts (e.g., "prudent and feasible alternatives" under Section 4(f) of the Department of Transportation Act, the "Least Environmentally Damaging Practicable Alternative" under the Clean Water Act, or the planning Alternatives Analysis in 49 U.S.C. 5309(d) and (e)).

11. Under what circumstances can alternatives he eliminated from detailed consideration during the NEPA process hased on information and analysis from the transportation planning process?

There are two ways in which the transportation planning process can begin limiting the alternative solutions to be evaluated during the NEPA process: (a) Shaping the purpose and need for the project; or (b) evaluating alternatives during planning studies and eliminating some of the alternatives from detailed study in the NEPA process prior to its start. Each approach requires careful attention, and is summarized below.

(a) *Shaping the Purpose and Need for the Project:* The transportation planning process should shape the purpose and need and,

thereby, the range of reasonable alternatives. With proper documentation and public involvement, a purpose and need derived from the planning process can legitimately narrow the alternatives analyzed in the NEPA process. See the response to Question 8 for further discussion on how the planning process can shape the purpose and need used in the NEPA process.

For example, the purpose and need may be shaped by the transportation planning process in a manner that consequently narrows the range of alternatives that must be considered in detail in the NEPA document when:

(1) The transportation planning process has selected a *general travel corridor* as best addressing identified transportation problems and the rationale for the determination in the planning document is reflected in the purpose and need statement of the subsequent NEPA document;

(2) The transportation planning process has selected a *general mode* (e.g., highway, transit, or a highway/transit combination) that accomplishes its goals and objectives, and these documented determinations are reflected in the purpose and need statement of the subsequent NEPA document; or

(3) The transportation planning process determines that the project needs to be funded by *tolls or other non-traditional funding sources* in order for the long-range transportation plan to be fiscally constrained or identifies goals and objectives that can only be met by toll roads or other non-traditional funding sources, and that determination of those goals and objectives is reflected in the purpose and need statement of the subsequent NEPA document.

(b) *Evaluating and Eliminating Alternatives During the Transportation Planning Process:* The evaluation and elimination of alternatives during the transportation planning process can be incorporated by reference into a NEPA document under certain circumstances. In these cases, the planning study becomes part of the NEPA process and provides a basis for screening out alternatives. As with any part of the NEPA process, the analysis of alternatives to be incorporated from the process must have a rational basis that has been thoroughly documented (including documentation of the necessary and appropriate vetting through the applicable public involvement processes). This record should be made available for public review during the NEPA scoping process.

See responses to Questions 4, 5, 6, and 7 for additional elements to consider with respect to acceptance of planning products for NEPA documentation and the response to Question 12 on the information or analysis from the transportation planning process necessary for supporting the elimination of an alternative(s) from detailed consideration in the NEPA process.

For instance, under FTA's Capital Investment Grant program, the alternatives considered in the NEPA process may be narrowed in those instances that the planning Alternatives Analysis required by 49 U.S.C. 5309(e) is conducted as a planning study prior to the NEPA review. In fact, the FTA may be able to narrow the alternatives considered in detail in the NEPA document to the No-Build (No Action) alternative and the Locally Preferred Alternative. Alternatives must meet the following criteria if they are deemed sufficiently considered by a planning Alternatives Analysis under FTA's Capital Investment Grant program conducted prior to NEPA without a programmatic NEPA analysis and documentation:

- During the planning Alternatives Analysis, all of the reasonable alternatives under consideration must be fully evaluated in terms of their transportation impacts; capital and operating costs; social, economic, and environmental impacts; and technical considerations;
- There must be appropriate public involvement in the planning Alternatives Analysis;
- The appropriate Federal, State, and local environmental, regulatory, and resource agencies must be engaged in the planning Alternatives Analysis;
- The results of the planning Alternatives Analysis must be documented;
- The NEPA scoping participants must agree on the alternatives that will be considered in the NEPA review; and
- The subsequent NEPA document must include the evaluation of alternatives from the planning Alternatives Analysis.

The above criteria apply specifically to FTA's Capital Investment Grant process. However, for other transportation projects, if the planning process has included the analysis and stakeholder involvement that would be undertaken in a first tier NEPA process, then the alternatives screening conducted in the transportation planning process may he incorporated by reference, described, and relied upon in the project-level NEPA document. At that point, the project-level NEPA analysis can focus on the remaining alternatives.

12. What information or analysis from the transportation planning process is needed in an EA or EIS to support the elimination of an alternative(s) from detailed consideration?

The section of the EA or EIS that discusses alternatives considered but eliminated from detailed consideration should:

(a) Identify any alternatives eliminated during the transportation planning process (this could include broad categories of alternatives, as when a long-range transportation plan selects a general travel corridor based

on a corridor study, thereby eliminating all alternatives along other alignments);

(b) Briefly summarize the reasons for eliminating the alternative; and

(c) Include a summary of the analysis process that supports the elimination of alternatives (the summary should reference the relevant sections or pages of the analysis or study) and incorporate it by reference or append it to the NEPA document.

Any analyses or studies used to eliminate alternatives from detailed consideration should be made available to the public and participating agencies during the NEPA scoping process and should be reasonably available during comment periods.

Alternatives passed over during the transportation planning process because they are infeasible or do not meet the NEPA "purpose and need" can be omitted from the detailed analysis of alternatives in the NEPA document, as long as the rationale for elimination is explained in the NEPA document. Alternatives that remain "reasonable" after the planning-level analysis must be addressed in the EIS, even when they are not the preferred alternative. When the proposed action evaluated in an EA involves unresolved conflicts concerning alternative uses of available resources, NEPA requires that appropriate alternatives be studied, developed, and described.

Affected Environment and Environmental Consequences:

13. What types of planning products provide analysis of the affected envirounent and environmental consequences that are useful in a project-level NEPA analysis and document?

The following planning products are valuable inputs to the discussion of the affected environment and environmental consequences (both its current state and future state in the absence of the proposed action) in the project-level NEPA analysis and document:

- Regional development and growth analyses;
- Local land use, growth management, or development plans; and
- Population and employment projections.

The following are types of information, analysis, and other products from the transportation planning process that can be used in the discussion of the affected environment and environmental consequences in an EA or EIS:

(a) Geographic information system (GIS) overlays showing the past, current, or predicted future conditions of the natural and huilt environments;

(b) Environmental scans that identify environmental resources and environmentally sensitive areas;

(c) Descriptions of airsheds and watersheds;

(d) Demographic trends and forecasts;

(e) Projections of future land use, natural resource conservation areas, and development; and

(f) The outputs of natural resource planning efforts, such as wildlife conservation plans, watershed plans, special area management plans, and multiple species habitat conservation plans.

However, in most cases, the assessment of the affected environment and environmental consequences conducted during the transportation planning process will not be detailed or current enough to meet NEPA standards and, thus, the inventory and evaluation of affected resources and the analysis of conseqnences of the alternatives will need to be supplemented with more refined analysis and possibly site-specific details during the NEPA process.

14. What information from the transportation planning process is useful in describing a baseline for the NEPA analysis of indirect and cumulative impacts?

Because the nature of the transportation planning process is to look broadly at future land use, development, population increases, and other growth factors, the planning analysis can provide the basis for the assessment of indirect and cumulative impacts required under NEPA. The consideration in the transportation planning process of development, growth, and consistency with local land use, growth management, or development plans, as well as population and employment projections, provides an overview of the multitude of factors in an area that are creating pressures not only on the transportation system, but on the natural ecosystem and important environmental and community resources. An analysis of all reasonably foreseeable actions in the area also should be a part of the transportation planning process. This planning-level information should be captured and utilized in the analysis of indirect and cumulative impacts during the NEPA process.

To be used in the analysis of indirect and cumulative impacts, such information should:

(a) Be sufficiently detailed that differences in consequences of alternatives can be readily identified;

(b) Be based on current data (e.g., data from the most recent Census) or be updated by additional information;

(c) Be based on reasonable assumptions that are clearly stated; and/or

(d) Rely on analytical methods and modeling techniques that are reliable, defensible, and reasonably current.

Environmental Mitigation:

15. How can planning-level efforts best support advance mitigation, mitigation hanking, and priorities for environmental mitigation investments?

A lesson learned from efforts to establish mitigation banks and advance mitigation

agreements and alternative mitigation options is the importance of beginning interagency discussions during the transportation planning process. Development pressures, habitat alteration, complicated real estate transactions, and competition for potential mitigation sites by public and private project proponents can encumber the already difficult task of mitigating for "like" value and function and reinforce the need to examine mitigation strategies as early as possible.

Robust use of remote sensing, GIS, and decision support systems for evaluating conservation strategies are all contributing to the advancement of natural resource and environmental planning. The outputs from environmental planning can now better inform transportation planning processes, including the development of mitigation strategies, so that transportation and conservation goals can be optimally met. For example, long-range transportation plans can be screened to assess the effect of general travel corridors or density, on the viability of sensitive plant and animal species or habitats. This type of screening provides a basis for early collaboration among transportation and environmental staffs, the public, and regulatory agencies to explore areas where impacts must be avoided and identify areas for mitigation investments. This can lead to mitigation strategies that are both more economical and more effective from an environmental stewardship perspective than traditional project-specific mitigation measures.

III. Administrative Issues:

16. Are Federal funds eligible to pay for these additional, or more in depth, environmental studies in transportation planning?

Yes. For example, the following FHWA and FTA funds may be utilized for conducting environmental studies and analyses within transportation planning:

- FHWA planning and research funds, as defined under 23 CFR Part 420 (e.g., Metropolitan Planning (PL), Statewide Planning and Research (SPR), National Highway System (NHS), Surface Transportation Program (STP), and Equity Bonus); and
- FTA planning and research funds (49 U.S.C. 5303 and 49 U.S.C. 5313(b)), urban formula funds (49 U.S.C. 5307), and (in limited circumstances) transit capital investment funds (49 U.S.C. 5309).

The eligible transportation planning-related uses of these funds may include: (a) Conducting feasibility or subarea/corridor needs studies and (b) developing system-wide environmental information/inventories (e.g., wetland banking inventories or standards to identify historically significant sites). Particularly in the case of PL and SPR funds, the proposed expenditure must be closely related to the development of transportation plans and programs under 23 U.S.C. 134–135 and 49 U.S.C. 5303–5306.

For FHWA funding programs, once a general travel corridor or specific project has progressed to a point in the preliminary engineering/NEPA phase that clearly extends beyond transportation planning, additional in-depth environmental studies must be funded through the program category for which the ultimate project qualifies (e.g., NHS, STP, Interstate Maintenance, and/or Bridge), rather than PL or SPR funds.

Another source of funding is FHWA's Transportation Enhancement program, which may be used for activities such as: conducting archeological planning and research; developing inventories such as those for historic bridges and highways, and other surface transportation-related structures; conducting studies to determine the extent of water pollution due to highway runoff; and conducting studies to reduce vehicle-caused wildlife mortality while maintaining habitat connectivity.

The FHWA and the FTA encourage State DOTs, MPOs, and public transportation operators to seek partners for some of these studies from environmental, regulatory, and resource agencies, non-government organizations, and other government and private sector entities with similar data needs, or environmental interests. In some cases, these partners may contribute data and expertise to the studies, as well as funding.

17. What staffing or organizational arrangements may be helpful in allowing planning products to be accepted in the NEPA process?

Certain organizational and staffing arrangements may support a more integrated approach to the planning/NEPA decision-making continuum. In many cases, planning organizations do not have environmental expertise on staff or readily accessible. Likewise, the review and regulatory responsibilities of many environmental, regulatory, and resource agencies make involvement in the transportation planning process a challenge for staff resources. These challenges may be partially met by improved use of the outputs of each agency's planning resources and by augmenting their capabilities through greater use of GIS and remote sensing technologies (see *http://www.gis.fhwa.dot.gov/* for additional information on the use of GIS). Sharing databases and the planning products of local land use decision-makers and State and Federal environmental, regulatory, and resource agencies also provide efficiencies in acquiring and sharing the data and information needed for both transportation planning and NEPA work.

Additional opportunities such as shared staff, training across disciplines, and (in some cases) reorganizing to eliminate structural divisions between planning and NEPA practitioners may also need to be considered

in order to better integrate NEPA considerations into transportation planning studies. The answers to the following two questions also contain useful information on training and staffing opportunities.

18. How have environmental, regulatory, and resource agency liaisons (Federally- and State DOT-funded positions) and partnership agreements been used to provide the expertise and interagency participation needed to enhance the consideration of environmental factors in the planning process?

For several years, States have utilized Federal and State transportation funds to support focused and accelerated project review by a variety of local, State, Tribal, and Federal agencies. While Section 1309(e) of the TEA–21 and its successor in SAFETEA–LU section 6002 speak specifically to transportation project streamlining, there are other authorities that have been used to fund positions, such as the Intergovernmental Cooperation Act (31 U.S.C. 6505). In addition, long-term, on-call consultant contracts can provide backfill support for staff that are detailed to other parts of an agency for temporary assignments. At last count (as of 2003), 246 positions were being funded. Additional information on interagency funding agreements is available at: *http://environment.fhwa.dot.gov/strmlng/igdocs/index.htm.*

Moreover, every State has advanced a variety of stewardship and streamlining initiatives that necessitate early involvement of environmental, regulatory, and resource agencies in the project development process. Such process improvements have: addressed the exchange of data to support avoidance and impact analysis; established formal and informal consultation and review schedules; advanced mitigation strategies; and resulted in a variety of programmatic reviews. Interagency agreements and workplans have evolved to describe performance objectives, as well as specific roles and responsibilities related to new streamlining initiatives. Some States have improved collaboration and efficiency by co-locating environmental, regulatory, and resource and transportation agency staff.

19. What training opportunities are available to MPOs, State DOTs, public transportation operators and environmental, regulatory, and resource agencies to assist in their understanding of the transportation planning and NEPA processes?

Both the FHWA and the FTA offer a variety of transportation planning, public involvement, and NEPA courses through the National Highway Institute and/or the National Transit Institute. Of particular note is the Linking Planning and NEPA Workshop, which provides a forum and facilitated group discussion among and between State DOT; MPO; Federal, Tribal, and State environmental, regulatory, and resource agencies; and FHWA/FTA representatives (at both the executive and program manager levels) to develop a State-specific action plan that will provide for strengthened linkages between the transportation planning and NEPA processes.

Moreover, the U.S. Fish and Wildlife Service offers Green Infrastructure Workshops that are focused on integrating planning for natural resources ("green infrastructure") with the development, economic, and other infrastructure needs of society ("gray infrastructure").

Robust planning and multi-issue environmental screening requires input from a wide variety of disciplines, including information technology; transportation planning; the NEPA process; and regulatory, permitting, and environmental specialty areas (e.g., noise, air quality, and biology). Senior managers at transportation and partner agencies can arrange a variety of individual training programs to support learning curves and skill development that contribute to a strengthened link of the transportation planning and NEPA processes. Formal and informal mentoring on an intra-agency basis can be arranged. Employee exchanges within and between agencies can be periodically scheduled, and persons involved with professional leadership programs can seek temporary assignments with partner agencies.

IV. Additional Information on this Topic

Valuable sources of information are FHWA's environment website (*http://www.fhwa.dot.gov/environment/index.htm*) and FTA's environmental streamlining website (*http://www.environment.fta.dot.gov*). Another source of information and case studies is NCHRP Report 8–38 (Consideration of Environmental Factors in Transportation Systems Planning), which is available at *http://www4.trb.org/trb/crp.nsf/All+Projects/NCHRP+8–38*. In addition, AASHTO's Center for Environmental Excellence website is continuously updated with news and links to information of interest to transportation and environmental professionals (*www.transportation.environment.org*).

PART 460—PUBLIC ROAD MILEAGE FOR APPORTIONMENT OF HIGHWAY SAFETY FUNDS

Sec.

460.1 Purpose.
460.2 Definitions.
460.3 Procedures.

AUTHORITY: 23 U.S.C. 315, 402(c); 49 CFR 1.48.

SOURCE: 40 FR 44322, Sept. 26, 1975, unless otherwise noted.

36 C.F.R. § 800.1

Title 36. Parks, Forests, and Public Property
Chapter VIII. Advisory Council on Historic Preservation
Part 800. Protection of Historic Properties
Subpart A. Purposes and Participants

§ 800.1. Purposes

(a) Purposes of the section 106 process. Section 106 of the National Historic Preservation Act requires Federal agencies to take into account the effects of their undertakings on historic properties and afford the Council a reasonable opportunity to comment on such undertakings. The procedures in this part define how Federal agencies meet these statutory responsibilities. The section 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning. The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.

(b) Relation to other provisions of the act. Section 106 is related to other provisions of the act designed to further the national policy of historic preservation. References to those provisions are included in this part to identify circumstances where they may affect actions taken to meet section 106 requirements. Such provisions may have their own implementing regulations or guidelines and are not intended to be implemented by the procedures in this part except insofar as they relate to the section 106 process. Guidelines, policies, and procedures issued by other agencies, including the Secretary, have been cited in this part for ease of access and are not incorporated by reference.

(c) Timing. The agency official must complete the section 106 process “prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license.” This does not prohibit agency official from conducting or authorizing nondestructive project planning activities before completing compliance with section 106, provided that such actions do not restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties. The agency official shall ensure that the section 106 process is initiated early in the undertaking's planning,

so that a broad range of alternatives may be considered during the planning process for the undertaking.

36 C.F.R. § 800.2

Title 36. Parks, Forests, and Public Property
Chapter VIII. Advisory Council on Historic Preservation
Part 800. Protection of Historic Properties
Subpart A. Purposes and Participants

§ 800.2. Participants in the Section 106 Process

(a) Agency official. It is the statutory obligation of the Federal agency to fulfill the requirements of section 106 and to ensure that an agency official with jurisdiction over an undertaking takes legal and financial responsibility forsection 106 compliance in accordance with subpart B of this part. The agency official has approval authority for the undertaking and can commit the Federal agency to take appropriate action for a specific undertaking as a result ofsection 106 compliance. For the purposes of subpart C of this part, the agency official has the authority to commit the Federal agency to any obligation it may assume in the implementation of a program alternative. The agency official may be a State, local, or tribal government official who has been delegated legal responsibility for compliance with section 106 in accordance with Federal law.

(1) Professional standards. Section 112(a)(1)(A) of the act requires each Federal agency responsible for the protection of historic resources, including archeological resources, to ensure that all actions taken by employees or contractors of the agency shall meet professional standards under regulations developed by the Secretary.

(2) Lead Federal agency. If more than one Federal agency is involved in an undertaking, some or all the agencies may designate a lead Federal agency, which shall identify the appropriate official to serve as the agency official who shall act on their behalf, fulfilling their collective responsibilities under section 106. Those Federal agencies that do not designate a lead Federal agency remain individually responsible for their compliance with this part.

(3) Use of contractors. Consistent with applicable conflict of interest laws, the agency official may use the services of applicants, consultants, or designees to prepare information, analyses and recommendations under this part. The agency official remains legally responsible for all required findings and determinations. If a document or study is prepared by a non-Federal party, the agency official is

responsible for ensuring that its content meets applicable standards and guidelines.

(4) Consultation. The agency official shall involve the consulting parties described in paragraph (c) of this section in findings and determinations made during the section 106 process. The agency official should plan consultations appropriate to the scale of the undertaking and the scope of Federal involvement and coordinated with other requirements of other statutes, as applicable, such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act, and agency-specific legislation. The Council encourages the agency official to use to the extent possible existing agency procedures and mechanisms to fulfill the consultation requirements of this part.

(b) Council. The Council issues regulations to implement section 106, provides guidance and advice on the application of the procedures in this part, and generally oversees the operation of the section 106 process. The Council also consults with and comments to agency officials on individual undertakings and programs that affect historic properties.

(1) Council entry into the section 106 process. When the Council determines that its involvement is necessary to ensure that the purposes of section 106 and the act are met, the Council may enter the section 106 process. Criteria guiding Council decisions to enter the section 106 process are found in appendix A to this part. The Council will document that the criteria have been met and notify the parties to the section 106 process as required by this part.

(2) Council assistance. Participants in the section 106 process may seek advice, guidance and assistance from the Council on the application of this part to specific undertakings, including the resolution of disagreements, whether or not the Council is formally involved in the review of the undertaking. If questions arise regarding the conduct of the section 106 process, participants are encouraged to obtain the Council's advice on completing the process.

(c) Consulting parties. The following parties have consultative roles in the section 106 process.

(1) State historic preservation officer.

(i) The State historic preservation officer (SHPO) reflects the interests of the State and its citizens in the preservation of their cultural heritage. In accordance with section 101(b)(3) of the act, the SHPO advises and assists Federal agencies in carrying out their section 106 responsibilities and cooperates with such agencies, local governments and organizations and individuals to ensure that historic properties are taking into consideration at all levels of planning and development.

(ii) If an Indian tribe has assumed the functions of the SHPO in the section 106 process for undertakings on tribal lands, the SHPO shall participate as a consulting party if the undertaking takes place on tribal lands but affects historic properties off tribal lands, if requested in accordance with § 800.3(c)(1), or if the Indian tribe agrees to include the SHPO pursuant to § 800.3(f)(3).

(2) Indian tribes and Native Hawaiian organizations.

(i) Consultation on tribal lands.

(A) Tribal historic preservation officer. For a tribe that has assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the tribal historic preservation officer (THPO) appointed or designated in accordance with the act is the official representative for the purposes of section 106. The agency official shall consult with the THPO in lieu of the SHPO regarding undertakings occurring on or affecting historic properties on tribal lands.

(B) Tribes that have not assumed SHPO functions. When an Indian tribe has not assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the agency official shall consult with a representative designated by such Indian tribe in addition to the SHPO regarding undertakings occurring on or affecting historic properties on its tribal lands. Such Indian tribes have the same rights of consultation and concurrence that the THPOs are given throughout subpart B of this part, except that such consultations shall be in addition to and on the same basis as consultation with the SHPO.

(ii) Consultation on historic properties of significance to Indian tribes and Native Hawaiian organizations. Section 101(d)(6)(B) of the act requires the agency official to consult with any Indian tribe or Native Hawaiian

organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking. This requirement applies regardless of the location of the historic property. Such Indian tribe or Native Hawaiian organization shall be a consulting party.

(A) The agency official shall ensure that consultation in the section 106 process provides the Indian tribe or Native Hawaiian organization a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects. It is the responsibility of the agency official to make a reasonable and good faith effort to identify Indian tribes and Native Hawaiian organizations that shall be consulted in the section 106 process. Consultation should commence early in the planning process, in order to identify and discuss relevant preservation issues and resolve concerns about the confidentiality of information on historic properties.

(B) The Federal Government has a unique legal relationship with Indian tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions. Consultation with Indian tribes should be conducted in a sensitive manner respectful of tribal sovereignty. Nothing in this part alters, amends, repeals, interprets, or modifies tribal sovereignty, any treaty rights, or other rights of an Indian tribe, or preempts, modifies, or limits the exercise of any such rights.

(C) Consultation with an Indian tribe must recognize the government-to-government relationship between the Federal Government and Indian tribes. The agency official shall consult with representatives designated or identified by the tribal government or the governing body of a Native Hawaiian organization. Consultation with Indian tribes and Native Hawaiian organizations should be conducted in a manner sensitive to the concerns and needs of the Indian tribe or Native Hawaiian organization.

(D) When Indian tribes and Native Hawaiian organizations attach religious and cultural significance to historic properties off tribal lands, section 101(d)(6)(B) of the act requires Federal agencies to consult with such Indian tribes and Native Hawaiian organizations in the section 106 process. Federal agencies should be aware that frequently historic

properties of religious and cultural significance are located on ancestral, aboriginal, or ceded lands of Indian tribes and Native Hawaiian organizations and should consider that when complying with the procedures in this part.

(E) An Indian tribe or a Native Hawaiian organization may enter into an agreement with an agency official that specifies how they will carry out responsibilities under this part, including concerns over the confidentiality of information. An agreement may cover all aspects of tribal participation in the section 106 process, provided that no modification may be made in the roles of other parties to the section 106 process without their consent. An agreement may grant the Indian tribe or Native Hawaiian organization additional rights to participate or concur in agency decisions in the section 106 process beyond those specified in subpart B of this part. The agency official shall provide a copy of any such agreement to the Council and the appropriate SHPOs.

(F) An Indian tribe that has not assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act may notify the agency official in writing that it is waiving its rights under § 800.6(c)(1)to execute a memorandum of agreement.

(3) Representatives of local governments. A representative of a local government with jurisdiction over the area in which the effects of an undertaking may occur is entitled to participate as a consulting party. Under other provisions of Federal law, the local government may be authorized to act as the agency official for purposes of section 106.

(4) Applicants for Federal assistance, permits, licenses, and other approvals. An applicant for Federal assistance or for a Federal permit, license, or other approval is entitled to participate as a consulting party as defined in this part. The agency official may authorize an applicant or group of applicants to initiate consultation with the SHPO/THPO and others, but remains legally responsible for all findings and determinations charged to the agency official. The agency official shall notify the SHPO/THPO when an applicant or group of applicants is so authorized. A Federal agency may authorize all applicants in a specific program pursuant to this section by providing notice to all SHPO/THPOs. Federal agencies that provide authorizations to applicants remain responsible for their government-to-government relationships with Indian tribes.

(5) Additional consulting parties. Certain individuals and organizations with a demonstrated interest in the undertaking may participate as consulting parties due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties.

(d) The public.

(1) Nature of involvement. The views of the public are essential to informed Federal decisionmaking in the section 106 process. The agency official shall seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, the likely interest of the public in the effects on historic properties, confidentiality concerns of private individuals and businesses, and the relationship of the Federal involvement to the undertaking.

(2) Providing notice and information. The agency official must, except where appropriate to protect confidentiality concerns of affected parties, provide the public with information about an undertaking and its effects on historic properties and seek public comment and input. Members of the public may also provide views on their own initiative for the agency official to consider in decisionmaking.

(3) Use of agency procedures. The agency official may use the agency's procedures for public involvement under the National Environmental Policy Act or other program requirements in lieu of public involvement requirements in subpart B of this part, if they provide adequate opportunities for public involvement consistent with this subpart.

36 C.F.R. § 800.3

Title 36. Parks, Forests, and Public Property
Chapter VIII. Advisory Council on Historic Preservation
Part 800. Protection of Historic Properties
Subpart B. The Section 106 Process

§ 800.3. Initiation of the section 106 process

(a) Establish undertaking. The agency official shall determine whether the proposed Federal action is an undertaking as defined in § 800.16(y) and, if so, whether it is a type of activity that has the potential to cause effects on historic properties.

(1) No potential to cause effects. If the undertaking is a type of activity that does not have the potential to cause effects on historic properties, assuming such historic properties were present, the agency official has no further obligations under section 106 or this part.

(2) Program alternatives. If the review of the undertaking is governed by a Federal agency program alternative established under § 800.14 or a programmatic agreement in existence before January 11, 2001, the agency official shall follow the program alternative.

(b) Coordinate with other reviews. The agency official should coordinate the steps of the section 106 process, as appropriate, with the overall planning schedule for the undertaking and with any reviews required under other authorities such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act, and agency-specific legislation, such as section 4(f) of the Department of Transportation Act. Where consistent with the procedures in this subpart, the agency official may use information developed for other reviews under Federal, State, or tribal law to meet the requirements of section 106.

(c) Identify the appropriate SHPO and/or THPO. As part of its initial planning, the agency official shall determine the appropriate SHPO or SHPOs to be involved in the section 106 process. The agency official shall also determine whether the undertaking may occur on or affect historic properties on any tribal lands and, if so, whether a THPO has assumed the duties of the SHPO. The agency official shall then initiate consultation with the appropriate officer or officers.

(1) Tribal assumption of SHPO responsibilities. Where an Indian tribe has assumed the section 106 responsibilities of the SHPO on tribal lands pursuant to section 101(d)(2) of the act, consultation for undertakings occurring on tribal land or for effects on tribal land is with the THPO for the Indian tribe in lieu of the SHPO. Section 101(d)(2)(D)(iii) of the act authorizes owners of properties on tribal lands which are neither owned by a member of the tribe nor held in trust by the Secretary for the benefit of the tribe to request the SHPO to participate in the section 106 process in addition to the THPO.

(2) Undertakings involving more than one State. If more than one State is involved in an undertaking, the involved SHPOs may agree to designate a lead SHPO to act on their behalf in the section 106 process, including taking actions that would conclude the section 106 process under this subpart.

(3) Conducting consultation. The agency official should consult with the SHPO/THPO in a manner appropriate to the agency planning process for the undertaking and to the nature of the undertaking and its effects on historic properties.

(4) Failure of the SHPO/THPO to respond. If the SHPO/THPO fails to respond within 30 days of receipt of a request for review of a finding or determination, the agency official may either proceed to the next step in the process based on the finding or determination or consult with the Council in lieu of the SHPO/THPO. If the SHPO/THPO re-enters the Section 106 process, the agency official shall continue the consultation without being required to reconsider previous findings or determinations.

(d) Consultation on tribal lands. Where the Indian tribe has not assumed the responsibilities of the SHPO on tribal lands, consultation with the Indian tribe regarding undertakings occurring on such tribe's lands or effects on such tribal lands shall be in addition to and on the same basis as consultation with the SHPO. If the SHPO has withdrawn from the process, the agency official may complete the section 106 process with the Indian tribe and the Council, as appropriate. An Indian tribe may enter into an agreement with a SHPO or SHPOs specifying the SHPO's participation in the section 106 process for undertakings occurring on or affecting historic properties on tribal lands.

(e) Plan to involve the public. In consultation with the SHPO/THPO, the agency official shall plan for involving the public in the section 106 process. The agency

official shall identify the appropriate points for seeking public input and for notifying the public of proposed actions, consistent with § 800.2(d).

(f) Identify other consulting parties. In consultation with the SHPO/THPO, the agency official shall identify any other parties entitled to be consulting parties and invite them to participate as such in the section 106 process. The agency official may invite others to participate as consulting parties as the section 106 process moves forward.

(1) Involving local governments and applicants. The agency official shall invite any local governments or applicants that are entitled to be consulting parties under § 800.2(c).

(2) Involving Indian tribes and Native Hawaiian organizations. The agency official shall make a reasonable and good faith effort to identify any Indian tribes or Native Hawaiian organizations that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties. Such Indian tribe or Native Hawaiian organization that requests in writing to be a consulting party shall be one.

(3) Requests to be consulting parties. The agency official shall consider all written requests of individuals and organizations to participate as consulting parties and, in consultation with the SHPO/THPO and any Indian tribe upon whose tribal lands an undertaking occurs or affects historic properties, determine which should be consulting parties.

(g) Expediting consultation. A consultation by the agency official with the SHPO/THPO and other consulting parties may address multiple steps in §§ 800.3 through 800.6 where the agency official and the SHPO/THPO agree it is appropriate as long as the consulting parties and the public have an adequate opportunity to express their views as provided in § 800.2(d).

36 C.F.R. § 800.4

Title 36. Parks, Forests, and Public Property
Chapter VIII. Advisory Council on Historic Preservation
Part 800. Protection of Historic Properties
Subpart B. The Section 106 Process

§ 800.4. Identification of historic properties

(a) Determine scope of identification efforts. In consultation with the SHPO/THPO, the agency official shall:

(1) Determine and document the area of potential effects, as defined in § 800.16(d);

(2) Review existing information on historic properties within the area of potential effects, including any data concerning possible historic properties not yet identified;

(3) Seek information, as appropriate, from consulting parties, and other individuals and organizations likely to have knowledge of, or concerns with, historic properties in the area, and identify issues relating to the undertaking's potential effects on historic properties; and

(4) Gather information from any Indian tribe or Native Hawaiian organization identified pursuant to § 800.3(f) to assist in identifying properties, including those located off tribal lands, which may be of religious and cultural significance to them and may be eligible for the National Register, recognizing that an Indian tribe or Native Hawaiian organization may be reluctant to divulge specific information regarding the location, nature, and activities associated with such sites. The agency official should address concerns raised about confidentiality pursuant to § 800.11(c).

(b) Identify historic properties. Based on the information gathered under paragraph (a) of this section, and in consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to properties within the area of potential effects, the agency official shall take the steps necessary to identify historic properties within the area of potential effects.

(1) Level of effort. The agency official shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey. The agency official shall take into account past planning, research and studies, the magnitude and nature of the undertaking and the degree of Federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects. The Secretary's standards and guidelines for identification provide guidance on this subject. The agency official should also consider other applicable professional, State, tribal, and local laws, standards, and guidelines. The agency official shall take into account any confidentiality concerns raised by Indian tribes or Native Hawaiian organizations during the identification process.

(2) Phased identification and evaluation. Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process to conduct identification and evaluation efforts. The agency official may also defer final identification and evaluation of historic properties if it is specifically provided for in a memorandum of agreement executed pursuant to § 800.6, a programmatic agreement executed pursuant to § 800.14(b), or the documents used by an agency official to comply with the National Environmental Policy Act pursuant to § 800.8. The process should establish the likely presence of historic properties within the area of potential effects for each alternative or inaccessible area through background research, consultation and an appropriate level of field investigation, taking into account the number of alternatives under consideration, the magnitude of the undertaking and its likely effects, and the views of the SHPO/THPO and any other consulting parties. As specific aspects or locations of an alternative are refined or access is gained, the agency official shall proceed with the identification and evaluation of historic properties in accordance with paragraphs (b)(1) and (c) of this section.

(c) Evaluate historic significance.

(1) Apply National Register criteria. In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified properties and guided by the Secretary's standards and guidelines for evaluation, the agency official shall apply the National Register criteria (36 CFR part 63) to properties identified within the area of potential effects that have not been previously evaluated for National

Register eligibility. The passage of time, changing perceptions of significance, or incomplete prior evaluations may require the agency official to reevaluate properties previously determined eligible or ineligible. The agency official shall acknowledge that Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.

(2) Determine whether a property is eligible. If the agency official determines any of the National Register criteria are met and the SHPO/THPO agrees, the property shall be considered eligible for the National Register for section 106 purposes. If the agency official determines the criteria are not met and the SHPO/THPO agrees, the property shall be considered not eligible. If the agency official and the SHPO/THPO do not agree, or if the Council or the Secretary so request, the agency official shall obtain a determination of eligibility from the Secretary pursuant to 36 CFR part 63. If an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to a property off tribal lands does not agree, it may ask the Council to request the agency official to obtain a determination of eligibility.

(d) Results of identification and evaluation.

(1) No historic properties affected. If the agency official finds that either there are no historic properties present or there are historic properties present but the undertaking will have no effect upon them as defined in § 800.16(i), the agency official shall provide documentation of this finding, as set forth in § 800.11(d), to the SHPO/THPO. The agency official shall notify all consulting parties, including Indian tribes and Native Hawaiian organizations, and make the documentation available for public inspection prior to approving the undertaking.

(i) If the SHPO/THPO, or the Council if it has entered the section 106 process, does not object within 30 days of receipt of an adequately documented finding, the agency official's responsibilities under section 106 are fulfilled.

(ii) If the SHPO/THPO objects within 30 days of receipt of an adequately documented finding, the agency official shall either consult with the objecting party to resolve the disagreement, or forward the finding and supporting documentation to the Council and request that the Council review the finding pursuant to paragraphs (d)(1)(iv)(A) through (d)(1)(iv)(C) of this

section. When an agency official forwards such requests for review to the Council, the agency official shall concurrently notify all consulting parties that such a request has been made and make the request documentation available to the public.

(iii) During the SHPO/THPO 30 day review period, the Council may object to the finding and provide its opinion regarding the finding to the agency official and, if the Council determines the issue warrants it, the head of the agency. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. The agency shall then proceed according to paragraphs (d)(1)(iv)(B) and (d)(1)(iv)(C) of this section.

(iv)(A) Upon receipt of the request under paragraph (d)(1)(ii) of this section, the Council will have 30 days in which to review the finding and provide the agency official and, if the Council determines the issue warrants it, the head of the agency with the Council's opinion regarding the finding. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. If the Council does not respond within 30 days of receipt of the request, the agency official's responsibilities under section 106 are fulfilled.

(B) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall take into account the Council's opinion before the agency reaches a final decision on the finding.

(C) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall then prepare a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's opinion, and provide it to the Council, the SHPO/THPO, and the consulting parties. The head of the agency may delegate his or her duties under this paragraph to the agency's senior policy official. If the agency official's initial finding will be revised, the agency official shall proceed in accordance with the revised finding. If the final decision of the agency is to affirm the initial agency finding of no historic properties affected, once the summary of the decision has been sent to the Council, the SHPO/THPO, and the consulting parties, the agency official's responsibilities under section 106 are fulfilled.

(D) The Council shall retain a record of agency responses to Council opinions on their findings of no historic properties affected. The Council shall make this information available to the public.

(2) Historic properties affected. If the agency official finds that there are historic properties which may be affected by the undertaking, the agency official shall notify all consulting parties, including Indian tribes or Native Hawaiian organizations, invite their views on the effects and assess adverse effects, if any, in accordance with § 800.5.

36 C.F.R. § 800.5

Title 36. Parks, Forests, and Public Property
Chapter VIII. Advisory Council on Historic Preservation
Part 800. Protection of Historic Properties
Subpart B. The Section 106 Process

§ 800.5. Assessment of adverse effects

(a) Apply criteria of adverse effect. In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified historic properties, the agency official shall apply the criteria of adverse effect to historic properties within the area of potential effects. The agency official shall consider any views concerning such effects which have been provided by consulting parties and the public.

(1) Criteria of adverse effect. An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.

(2) Examples of adverse effects. Adverse effects on historic properties include, but are not limited to:

(i) Physical destruction of or damage to all or part of the property;

(ii) Alteration of a property, including restoration, rehabilitation, repair, maintenance, stabilization, hazardous material remediation, and provision of handicapped access, that is not consistent with the Secretary's standards for the treatment of historic properties (36 CFR part 68) and applicable guidelines;

(iii) Removal of the property from its historic location;

(iv) Change of the character of the property's use or of physical features within the property's setting that contribute to its historic significance;

(v) Introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features;

(vi) Neglect of a property which causes its deterioration, except where such neglect and deterioration are recognized qualities of a property of religious and cultural significance to an Indian tribe or Native Hawaiian organization; and

(vii) Transfer, lease, or sale of property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance.

(3) Phased application of criteria. Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process in applying the criteria of adverse effect consistent with phased identification and evaluation efforts conducted pursuant to § 800.4(b)(2).

(b) Finding of no adverse effect. The agency official, in consultation with the SHPO/THPO, may propose a finding of no adverse effect when the undertaking's effects do not meet the criteria of paragraph (a)(1) of this section or the undertaking is modified or conditions are imposed, such as the subsequent review of plans for rehabilitation by the SHPO/THPO to ensure consistency with the Secretary's standards for the treatment of historic properties (36 CFR part 68) and applicable guidelines, to avoid adverse effects.

(c) Consulting party review. If the agency official proposes a finding of no adverse effect, the agency official shall notify all consulting parties of the finding and provide them with the documentation specified in § 800.11(e). The SHPO/THPO shall have 30 days from receipt to review the finding.

(1) Agreement with, or no objection to, finding. Unless the Council is reviewing the finding pursuant to papagraph (c)(3) of this section, the agency official may proceed after the close of the 30 day review period if the SHPO/THPO has agreed with the finding or has not provided a response, and no consulting party has objected. The agency official shall then carry out the undertaking in accordance with paragraph (d)(1) of this section.

(2) Disagreement with finding.

(i) If within the 30 day review period the SHPO/THPO or any consulting party notifies the agency official in writing that it disagrees with the finding and specifies the reasons for the disagreement in the notification, the agency official shall either consult with the party to resolve the disagreement, or request the Council to review the finding pursuant to paragraphs (c)(3)(i) and (c)(3)(ii) of this section. The agency official shall include with such request the documentation specified in § 800.11(e). The agency official shall also concurrently notify all consulting parties that such a submission has been made and make the submission documentation available to the public.

(ii) If within the 30 day review period the Council provides the agency official and, if the Council determines the issue warrants it, the head of the agency, with a written opinion objecting to the finding, the agency shall then proceed according to paragraph (c)(3)(ii) of this section. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part.

(iii) The agency official should seek the concurrence of any Indian tribe or Native Hawaiian organization that has made known to the agency official that it attaches religious and cultural significance to a historic property subject to the finding. If such Indian tribe or Native Hawaiian organization disagrees with the finding, it may within the 30 day review period specify the reasons for disagreeing with the finding and request the Council to review and object to the finding pursuant to paragraph (c)(2)(ii) of this section.

(3) Council review of findings.

(i) When a finding is submitted to the Council pursuant to paragraph (c)(2)(i) of this section, the Council shall review the finding and provide the agency official and, if the Council determines the issue warrants it, the head of the agency with its opinion as to whether the adverse effect criteria have been correctly applied. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. The Council will provide its opinion within 15 days of receiving the documented finding from the agency official. The Council at its discretion may extend that time period for 15 days, in which case it shall notify the agency of such

extension prior to the end of the initial 15 day period. If the Council does not respond within the applicable time period, the agency official's responsibilities under section 106 are fulfilled.

(ii)(A) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall take into account the Council's opinion in reaching a final decision on the finding.

(B) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall prepare a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's opinion, and provide it to the Council, the SHPO/THPO, and the consulting parties. The head of the agency may delegate his or her duties under this paragraph to the agency's senior policy official. If the agency official's initial finding will be revised, the agency official shall proceed in accordance with the revised finding. If the final decision of the agency is to affirm the initial finding of no adverse effect, once the summary of the decision has been sent to the Council, the SHPO/THPO, and the consulting parties, the agency official's responsibilities under section 106 are fulfilled.

(C) The Council shall retain a record of agency responses to Council opinions on their findings of no adverse effects. The Council shall make this information available to the public.

(d) Results of assessment.

(1) No adverse effect. The agency official shall maintain a record of the finding and provide information on the finding to the public on request, consistent with the confidentiality provisions of § 800.11(c). Implementation of the undertaking in accordance with the finding as documented fulfills the agency official's responsibilities under section 106 and this part. If the agency official will not conduct the undertaking as proposed in the finding, the agency official shall reopen consultation under paragraph (a) of this section.

(2) Adverse effect. If an adverse effect is found, the agency official shall consult further to resolve the adverse effect pursuant to § 800.6.

36 C.F.R. § 800.6

Title 36. Parks, Forests, and Public Property
Chapter VIII. Advisory Council on Historic Preservation
Part 800. Protection of Historic Properties
Subpart B. The Section 106 Process

§ 800.6. Resolution of adverse effects

(a) Continue consultation. The agency official shall consult with the SHPO/THPO and other consulting parties, including Indian tribes and Native Hawaiian organizations, to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties.

(1) Notify the Council and determine Council participation. The agency official shall notify the Council of the adverse effect finding by providing the documentation specified in § 800.11(e).

(i) The notice shall invite the Council to participate in the consultation when:

(A) The agency official wants the Council to participate;

(B) The undertaking has an adverse effect upon a National Historic Landmark; or

(C) A programmatic agreement under § 800.14(b) will be prepared;

(ii) The SHPO/THPO, an Indian tribe or Native Hawaiian organization, or any other consulting party may at any time independently request the Council to participate in the consultation.

(iii) The Council shall advise the agency official and all consulting parties whether it will participate within 15 days of receipt of notice or other request. Prior to entering the process, the Council shall provide written notice to the agency official and the consulting parties that its decision to participate meets the criteria set forth in appendix A to this part. The Council shall also advise the head of the agency of its decision to enter the process. Consultation with Council participation is conducted in accordance with paragraph (b)(2) of this section.

(iv) If the Council does not join the consultation, the agency official shall proceed with consultation in accordance with paragraph (b)(1) of this section.

(2) Involve consulting parties. In addition to the consulting parties identified under § 800.3(f), the agency official, the SHPO/THPO and the Council, if participating, may agree to invite other individuals or organizations to become consulting parties. The agency official shall invite any individual or organization that will assume a specific role or responsibility in a memorandum of agreement to participate as a consulting party.

(3) Provide documentation. The agency official shall provide to all consulting parties the documentation specified in § 800.11(e), subject to the confidentiality provisions of § 800.11(c), and such other documentation as may be developed during the consultation to resolve adverse effects.

(4) Involve the public. The agency official shall make information available to the public, including the documentation specified in § 800.11(e), subject to the confidentiality provisions of § 800.11(c). The agency official shall provide an opportunity for members of the public to express their views on resolving adverse effects of the undertaking. The agency official should use appropriate mechanisms, taking into account the magnitude of the undertaking and the nature of its effects upon historic properties, the likely effects on historic properties, and the relationship of the Federal involvement to the undertaking to ensure that the public's views are considered in the consultation. The agency official should also consider the extent of notice and information concerning historic preservation issues afforded the public at earlier steps in the section 106 process to determine the appropriate level of public involvement when resolving adverse effects so that the standards of § 800.2(d) are met.

(5) Restrictions on disclosure of information. Section 304 of the act and other authorities may limit the disclosure of information under paragraphs (a)(3) and (a)(4) of this section. If an Indian tribe or Native Hawaiian organization objects to the disclosure of information or if the agency official believes that there are other reasons to withhold information, the agency official shall comply with § 800.11(c) regarding the disclosure of such information.

(b) Resolve adverse effects.

(1) Resolution without the Council.

(i) The agency official shall consult with the SHPO/THPO and other consulting parties to seek ways to avoid, minimize or mitigate the adverse effects.

(ii) The agency official may use standard treatments established by the Council under § 800.14(d) as a basis for a memorandum of agreement.

(iii) If the Council decides to join the consultation, the agency official shall follow paragraph (b)(2) of this section.

(iv) If the agency official and the SHPO/THPO agree on how the adverse effects will be resolved, they shall execute a memorandum of agreement. The agency official must submit a copy of the executed memorandum of agreement, along with the documentation specified in § 800.11(f), to the Council prior to approving the undertaking in order to meet the requirements of section 106 and this subpart.

(v) If the agency official, and the SHPO/THPO fail to agree on the terms of a memorandum of agreement, the agency official shall request the Council to join the consultation and provide the Council with the documentation set forth in § 800.11(g). If the Council decides to join the consultation, the agency official shall proceed in accordance with paragraph (b)(2) of this section. If the Council decides not to join the consultation, the Council will notify the agency and proceed to comment in accordance with § 800.7(c).

(2) Resolution with Council participation. If the Council decides to participate in the consultation, the agency official shall consult with the SHPO/THPO, the Council, and other consulting parties, including Indian tribes and Native Hawaiian organizations under § 800.2(c)(3), to seek ways to avoid, minimize or mitigate the adverse effects. If the agency official, the SHPO/THPO, and the Council agree on how the adverse effects will be resolved, they shall execute a memorandum of agreement.

(c) Memorandum of agreement. A memorandum of agreement executed and implemented pursuant to this section evidences the agency official's compliance with section 106 and this part and shall govern the undertaking and all of its parts. The agency official shall ensure that the undertaking is carried out in accordance with the memorandum of agreement.

(1) Signatories. The signatories have sole authority to execute, amend or terminate the agreement in accordance with this subpart.

(i) The agency official and the SHPO/THPO are the signatories to a memorandum of agreement executed pursuant to paragraph (b)(1) of this section.

(ii) The agency official, the SHPO/THPO, and the Council are the signatories to a memorandum of agreement executed pursuant to paragraph (b)(2) of this section.

(iii) The agency official and the Council are signatories to a memorandum of agreement executed pursuant to § 800.7(a)(2).

(2) Invited signatories.

(i) The agency official may invite additional parties to be signatories to a memorandum of agreement. Any such party that signs the memorandum of agreement shall have the same rights with regard to seeking amendment or termination of the memorandum of agreement as other signatories.

(ii) The agency official may invite an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties located off tribal lands to be a signatory to a memorandum of agreement concerning such properties.

(iii) The agency official should invite any party that assumes a responsibility under a memorandum of agreement to be a signatory.

(iv) The refusal of any party invited to become a signatory to a memorandum of agreement pursuant to paragraph (c)(2) of this section does not invalidate the memorandum of agreement.

(3) Concurrence by others. The agency official may invite all consulting parties to concur in the memorandum of agreement. The signatories may agree to invite others to concur. The refusal of any party invited to concur in the memorandum of agreement does not invalidate the memorandum of agreement.

(4) Reports on implementation. Where the signatories agree it is appropriate, a memorandum of agreement shall include a provision for monitoring and reporting on its implementation.

(5) Duration. A memorandum of agreement shall include provisions for termination and for reconsideration of terms if the undertaking has not been implemented within a specified time.

(6) Discoveries. Where the signatories agree it is appropriate, a memorandum of agreement shall include provisions to deal with the subsequent discovery or identification of additional historic properties affected by the undertaking.

(7) Amendments. The signatories to a memorandum of agreement may amend it. If the Council was not a signatory to the original agreement and the signatories execute an amended agreement, the agency official shall file it with the Council.

(8) Termination. If any signatory determines that the terms of a memorandum of agreement cannot be or are not being carried out, the signatories shall consult to seek amendment of the agreement. If the agreement is not amended, any signatory may terminate it. The agency official shall either execute a memorandum of agreement with signatories under paragraph (c)(1) of this section or request the comments of the Council under § 800.7(a).

(9) Copies. The agency official shall provide each consulting party with a copy of any memorandum of agreement executed pursuant to this subpart.

36 C.F.R. § 800.7

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§ 800.7. Failure to resolve adverse effects

(a) Termination of consultation. After consulting to resolve adverse effects pursuant to § 800.6(b)(2), the agency official, the SHPO/THPO, or the Council may determine that further consultation will not be productive and terminate consultation. Any party that terminates consultation shall notify the other consulting parties and provide them the reasons for terminating in writing.

(1) If the agency official terminates consultation, the head of the agency or an Assistant Secretary or other officer with major department-wide or agency-wide responsibilities shall request that the Council comment pursuant to paragraph (c) of this section and shall notify all consulting parties of the request.

(2) If the SHPO terminates consultation, the agency official and the Council may execute a memorandum of agreement without the SHPO's involvement.

(3) If a THPO terminates consultation regarding an undertaking occurring on or affecting historic properties on its tribal lands, the Council shall comment pursuant to paragraph (c) of this section.

(4) If the Council terminates consultation, the Council shall notify the agency official, the agency's Federal preservation officer and all consulting parties of the termination and comment under paragraph (c) of this section. The Council may consult with the agency's Federal preservation officer prior to terminating consultation to seek to resolve issues concerning the undertaking and its effects on historic properties.

(b) Comments without termination. The Council may determine that it is appropriate to provide additional advisory comments upon an undertaking for which a memorandum of agreement will be executed. The Council shall provide them to the agency official when it executes the memorandum of agreement.

(c) Comments by the Council.

(1) Preparation. The Council shall provide an opportunity for the agency official, all consulting parties, and the public to provide their views within the time frame for developing its comments. Upon request of the Council, the agency official shall provide additional existing information concerning the undertaking and assist the Council in arranging an onsite inspection and an opportunity for public participation.

(2) Timing. The Council shall transmit its comments within 45 days of receipt of a request under paragraph (a)(1) or (a)(3) of this section or § 800.8(c)(3), or termination by the Council under § 800.6(b)(1)(v) or paragraph (a)(4) of this section, unless otherwise agreed to by the agency official.

(3) Transmittal. The Council shall provide its comments to the head of the agency requesting comment with copies to the agency official, the agency's Federal preservation officer, all consulting parties, and others as appropriate.

(4) Response to Council comment. The head of the agency shall take into account the Council's comments in reaching a final decision on the undertaking. Section 110(l) of the act directs that the head of the agency shall document this decision and may not delegate his or her responsibilities pursuant to section 106. Documenting the agency head's decision shall include:

(i) Preparing a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's comments and providing it to the Council prior to approval of the undertaking;

(ii) Providing a copy of the summary to all consulting parties; and

(iii) Notifying the public and making the record available for public inspection.

36 C.F.R. § 800.8

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§ 800.8. Coordination With the National Environmental Policy Act

(a) General principles.

(1) Early coordination. Federal agencies are encouraged to coordinate compliance with section 106 and the procedures in this part with any steps taken to meet the requirements of the National Environmental Policy Act (NEPA). Agencies should consider their section 106 responsibilities as early as possible in the NEPA process, and plan their public participation, analysis, and review in such a way that they can meet the purposes and requirements of both statutes in a timely and efficient manner. The determination of whether an undertaking is a "major Federal action significantly affecting the quality of the human environment," and therefore requires preparation of an environmental impact statement (EIS) under NEPA, should include consideration of the undertaking's likely effects on historic properties. A finding of adverse effect on a historic property does not necessarily require an EIS under NEPA.

(2) Consulting party roles. SHPO/THPOs, Indian tribes, and Native Hawaiian organizations, other consulting parties, and organizations and individuals who may be concerned with the possible effects of an agency action on historic properties should be prepared to consult with agencies early in the NEPA process, when the purpose of and need for the proposed action as well as the widest possible range of alternatives are under consideration.

(3) Inclusion of historic preservation issues. Agency officials should ensure that preparation of an environmental assessment (EA) and finding of no significant impact (FONSI) or an EIS and record of decision (ROD) includes appropriate scoping, identification of historic properties, assessment of effects upon them, and consultation leading to resolution of any adverse effects.

(b) Actions categorically excluded under NEPA. If a project, activity or program is categorically excluded from NEPA review under an agency's NEPA procedures, the agency official shall determine if it still qualifies as an undertaking requiring

review under section 106 pursuant to § 800.3(a). If so, the agency official shall proceed with section 106 review in accordance with the procedures in this subpart.

(c) Use of the NEPA process for section 106 purposes. An agency official may use the process and documentation required for the preparation of an EA/FONSI or an EIS/ROD to comply with section 106 in lieu of the procedures set forth in §§ 800.3 through 800.6 if the agency official has notified in advance the SHPO/THPO and the Council that it intends to do so and the following standards are met.

(1) Standards for developing environmental documents to comply with Section 106. During preparation of the EA or draft EIS (DEIS) the agency official shall:

(i) Identify consulting parties either pursuant to § 800.3(f) or through the NEPA scoping process with results consistent with § 800.3(f);

(ii) Identify historic properties and assess the effects of the undertaking on such properties in a manner consistent with the standards and criteria of §§ 800.4 through 800.5, provided that the scope and timing of these steps may be phased to reflect the agency official's consideration of project alternatives in the NEPA process and the effort is commensurate with the assessment of other environmental factors;

(iii) Consult regarding the effects of the undertaking on historic properties with the SHPO/THPO, Indian tribes, and Native Hawaiian organizations that might attach religious and cultural significance to affected historic properties, other consulting parties, and the Council, where appropriate, during NEPA scoping, environmental analysis, and the preparation of NEPA documents;

(iv) Involve the public in accordance with the agency's published NEPA procedures; and

(v) Develop in consultation with identified consulting parties alternatives and proposed measures that might avoid, minimize or mitigate any adverse effects of the undertaking on historic properties and describe them in the EA or DEIS.

(2) Review of environmental documents.

(i) The agency official shall submit the EA, DEIS, or EIS to the SHPO/THPO, Indian tribes, and Native Hawaiian organizations that might attach religious and cultural significance to affected historic properties, and other consulting parties prior to or when making the document available for public comment. If the document being prepared is a DEIS or EIS, the agency official shall also submit it to the Council.

(ii) Prior to or within the time allowed for public comment on the document, a SHPO/THPO, an Indian tribe or Native Hawaiian organization, another consulting party or the Council may object to the agency official that preparation of the EA, DEIS, or EIS has not met the standards set forth in paragraph (c)(1) of this section or that the substantive resolution of the effects on historic properties proposed in an EA, DEIS, or EIS is inadequate. If the agency official receives such an objection, the agency official shall refer the matter to the Council.

(3) Resolution of objections. Within 30 days of the agency official's referral of an objection under paragraph (c)(2)(ii) of this section, the Council shall review the objection and notify the agency as to its opinion on the objection.

(i) If the Council agrees with the objection:

(A) The Council shall provide the agency official and, if the Council determines the issue warrants it, the head of the agency with the Council's opinion regarding the objection. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall take into account the Council's opinion in reaching a final decision on the issue of the objection.

(B) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall prepare a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's opinion, and provide it to the Council. The head of the agency may delegate his or her duties under this paragraph to the agency's senior Policy Official. If the agency official's initial decision regarding the matter that is the subject of the objection will be revised, the agency official shall proceed in accordance with the revised decision. If the final decision of the agency is to affirm the initial agency decision,

once the summary of the final decision has been sent to the Council, the agency official shall continue its compliance with this section.

(ii) If the Council disagrees with the objection, the Council shall so notify the agency official, in which case the agency official shall continue its compliance with this section.

(iii) If the Council fails to respond to the objection within the 30 day period, the agency official shall continue its compliance with this section.

(4) Approval of the undertaking. If the agency official has found, during the preparation of an EA or EIS that the effects of an undertaking on historic properties are adverse, the agency official shall develop measures in the EA, DEIS, or EIS to avoid, minimize, or mitigate such effects in accordance with paragraph (c)(1)(v) of this section. The agency official's responsibilities under section 106 and the procedures in this subpart shall then be satisfied when either:

(i) A binding commitment to such proposed measures is incorporated in:

(A) The ROD, if such measures were proposed in a DEIS or EIS; or

(B) An MOA drafted in compliance with § 800.6(c); or

(ii) The Council has commented under § 800.7 and received the agency's response to such comments.

(5) Modification of the undertaking. If the undertaking is modified after approval of the FONSI or the ROD in a manner that changes the undertaking or alters its effects on historic properties, or if the agency official fails to ensure that the measures to avoid, minimize or mitigate adverse effects (as specified in either the FONSI or the ROD, or in the binding commitment adopted pursuant to paragraph (c)(4) of this section) are carried out, the agency official shall notify the Council and all consulting parties that supplemental environmental documents will be prepared in compliance with NEPA or that the procedures in §§ 800.3 through 800.6 will be followed as necessary.

36 C.F.R. § 800.9

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§ 800.9. Council review of section 106 compliance

(a) Assessment of agency official compliance for individual undertakings. The Council may provide to the agency official its advisory opinion regarding the substance of any finding, determination or decision or regarding the adequacy of the agency official's compliance with the procedures under this part. The Council may provide such advice at any time at the request of any individual, agency or organization or on its own initiative. The agency official shall consider the views of the Council in reaching a decision on the matter in question.

(b) Agency foreclosure of the Council's opportunity to comment. Where an agency official has failed to complete the requirements of section 106 in accordance with the procedures in this part prior to the approval of an undertaking, the Council's opportunity to comment may be foreclosed. The Council may review a case to determine whether a foreclosure has occurred. The Council shall notify the agency official and the agency's Federal preservation officer and allow 30 days for the agency official to provide information as to whether foreclosure has occurred. If the Council determines foreclosure has occurred, the Council shall transmit the determination to the agency official and the head of the agency. The Council shall also make the determination available to the public and any parties known to be interested in the undertaking and its effects upon historic properties.

(c) Intentional adverse effects by applicants.

(1) Agency responsibility. Section 110(k) of the act prohibits a Federal agency from granting a loan, loan guarantee, permit, license or other assistance to an applicant who, with intent to avoid the requirements of section 106, has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, has allowed such significant adverse effect to occur, unless the agency, after consultation with the Council, determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. Guidance issued by the Secretary pursuant to section 110 of the act governs its implementation.

(2) Consultation with the Council. When an agency official determines, based on the actions of an applicant, that section 110(k) is applicable and that circumstances may justify granting the assistance, the agency official shall notify the Council and provide documentation specifying the circumstances under which the adverse effects to the historic property occurred and the degree of damage to the integrity of the property. This documentation shall include any views obtained from the applicant, SHPO/THPO, an Indian tribe if the undertaking occurs on or affects historic properties on tribal lands, and other parties known to be interested in the undertaking.

(i) Within thirty days of receiving the agency official's notification, unless otherwise agreed to by the agency official, the Council shall provide the agency official with its opinion as to whether circumstances justify granting assistance to the applicant and any possible mitigation of the adverse effects.

(ii) The agency official shall consider the Council's opinion in making a decision on whether to grant assistance to the applicant, and shall notify the Council, the SHPO/THPO, and other parties known to be interested in the undertaking prior to granting the assistance.

(3) Compliance with Section 106. If an agency official, after consulting with the Council, determines to grant the assistance, the agency official shall comply with §§ 800.3 through 800.6 to take into account the effects of the undertaking on any historic properties.

(d) Evaluation of Section 106 operations. The Council may evaluate the operation of the section 106 process by periodic reviews of how participants have fulfilled their legal responsibilities and how effectively the outcomes reached advance the purposes of the act.

(1) Information from participants. Section 203 of the act authorizes the Council to obtain information from Federal agencies necessary to conduct evaluation of the section 106 process. The agency official shall make documentation of agency policies, operating procedures and actions taken to comply with section 106 available to the Council upon request. The Council may request available information and documentation from other participants in the section 106 process.

(2) Improving the operation of section 106. Based upon any evaluation of the section 106 process, the Council may make recommendations to participants, the heads of Federal agencies, and the Secretary of actions to improve the efficiency and effectiveness of the process. Where the Council determines that an agency official or a SHPO/THPO has failed to properly carry out the responsibilities assigned under the process in this part, the Council may participate in individual case reviews conducted under such process in addition to the SHPO/THPO for such period that it determines is necessary to improve performance or correct deficiencies. If the Council finds a pattern of failure by a Federal agency in carrying out its responsibilities under section 106, the Council may review the policies and programs of the agency related to historic preservation pursuant to section 202(a)(6) of the act and recommend methods to improve the effectiveness, coordination, and consistency of those policies and programs with section 106.

36 C.F.R. § 800.10

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§ 800.10. Special requirements for protecting National Historic Landmarks

(a) Statutory requirement. Section 110(f) of the act requires that the agency official, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to any National Historic Landmark that may be directly and adversely affected by an undertaking. When commenting on such undertakings, the Council shall use the process set forth in §§ 800.6 through 800.7 and give special consideration to protecting National Historic Landmarks as specified in this section.

(b) Resolution of adverse effects. The agency official shall request the Council to participate in any consultation to resolve adverse effects on National Historic Landmarks conducted under § 800.6.

(c) Involvement of the Secretary. The agency official shall notify the Secretary of any consultation involving a National Historic Landmark and invite the Secretary to participate in the consultation where there may be an adverse effect. The Council may request a report from the Secretary under section 213 of the act to assist in the consultation.

(d) Report of outcome. When the Council participates in consultation under this section, it shall report the outcome of the section 106 process, providing its written comments or any memoranda of agreement to which it is a signatory, to the Secretary and the head of the agency responsible for the undertaking.

36 C.F.R. § 800.11

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§ 800.11. Documentation standards

(a) Adequacy of documentation. The agency official shall ensure that a determination, finding, or agreement under the procedures in this subpart is supported by sufficient documentation to enable any reviewing parties to understand its basis. The agency official shall provide such documentation to the extent permitted by law and within available funds. When an agency official is conducting phased identification or evaluation under this subpart, the documentation standards regarding description of historic properties may be applied flexibly. If the Council, or the SHPO/THPO when the Council is not involved, determines the applicable documentation standards are not met, the Council or the SHPO/THPO, as appropriate, shall notify the agency official and specify the information needed to meet the standard. At the request of the agency official or any of the consulting parties, the Council shall review any disputes over whether documentation standards are met and provide its views to the agency official and the consulting parties.

(b) Format. The agency official may use documentation prepared to comply with other laws to fulfill the requirements of the procedures in this subpart, if that documentation meets the standards of this section.

(c) Confidentiality.

(1) Authority to withhold information. Section 304 of the act provides that the head of a Federal agency or other public official receiving grant assistance pursuant to the act, after consultation with the Secretary, shall withhold from public disclosure information about the location, character, or ownership of a historic property when disclosure may cause a significant invasion of privacy; risk harm to the historic property; or impede the use of a traditional religious site by practitioners. When the head of a Federal agency or other public official has determined that information should be withheld from the public pursuant to these criteria, the Secretary, in consultation with such Federal agency head or

official, shall determine who may have access to the information for the purposes of carrying out the act.

(2) Consultation with the Council. When the information in question has been developed in the course of an agency's compliance with this part, the Secretary shall consult with the Council in reaching determinations on the withholding and release of information. The Federal agency shall provide the Council with available information, including views of the SHPO/THPO, Indian tribes and Native Hawaiian organizations, related to the confidentiality concern. The Council shall advise the Secretary and the Federal agency within 30 days of receipt of adequate documentation.

(3) Other authorities affecting confidentiality. Other Federal laws and program requirements may limit public access to information concerning an undertaking and its effects on historic properties. Where applicable, those authorities shall govern public access to information developed in the section 106 process and may authorize the agency official to protect the privacy of non-governmental applicants.

(d) Finding of no historic properties affected. Documentation shall include:

(1) A description of the undertaking, specifying the Federal involvement, and its area of potential effects, including photographs, maps, drawings, as necessary;

(2) A description of the steps taken to identify historic properties, including, as appropriate, efforts to seek information pursuant to § 800.4(b); and

(3) The basis for determining that no historic properties are present or affected.

(e) Finding of no adverse effect or adverse effect. Documentation shall include:

(1) A description of the undertaking, specifying the Federal involvement, and its area of potential effects, including photographs, maps, and drawings, as necessary;

(2) A description of the steps taken to identify historic properties;

(3) A description of the affected historic properties, including information on the characteristics that qualify them for the National Register;

(4) A description of the undertaking's effects on historic properties;

(5) An explanation of why the criteria of adverse effect were found applicable or inapplicable, including any conditions or future actions to avoid, minimize or mitigate adverse effects; and

(6) Copies or summaries of any views provided by consulting parties and the public.

(f) Memorandum of agreement. When a memorandum of agreement is filed with the Council, the documentation shall include, any substantive revisions or additions to the documentation provided the Council pursuant to § 800.6(a)(1), an evaluation of any measures considered to avoid or minimize the undertaking's adverse effects and a summary of the views of consulting parties and the public.

(g) Requests for comment without a memorandum of agreement. Documentation shall include:

(1) A description and evaluation of any alternatives or mitigation measures that the agency official proposes to resolve the undertaking's adverse effects;

(2) A description of any reasonable alternatives or mitigation measures that were considered but not chosen, and the reasons for their rejection;

(3) Copies or summaries of any views submitted to the agency official concerning the adverse effects of the undertaking on historic properties and alternatives to reduce or avoid those effects; and

(4) Any substantive revisions or additions to the documentation provided the Council pursuant to § 800.6(a)(1).

36 C.F.R. § 800.12

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§ 800.12. Emergency situations

(a) Agency procedures. The agency official, in consultation with the appropriate SHPOs/THPOs, affected Indian tribes and Native Hawaiian organizations, and the Council, is encouraged to develop procedures for taking historic properties into account during operations which respond to a disaster or emergency declared by the President, a tribal government, or the Governor of a State or which respond to other immediate threats to life or property. If approved by the Council, the procedures shall govern the agency's historic preservation responsibilities during any disaster or emergency in lieu of §§ 800.3 through 800.6.

(b) Alternatives to agency procedures. In the event an agency official proposes an emergency undertaking as an essential and immediate response to a disaster or emergency declared by the President, a tribal government, or the Governor of a State or another immediate threat to life or property, and the agency has not developed procedures pursuant to paragraph (a) of this section, the agency official may comply with section 106 by:

(1) Following a programmatic agreement developed pursuant to § 800.14(b) that contains specific provisions for dealing with historic properties in emergency situations; or

(2) Notifying the Council, the appropriate SHPO/THPO and any Indian tribe or Native Hawaiian organization that may attach religious and cultural significance to historic properties likely to be affected prior to the undertaking and affording them an opportunity to comment within seven days of notification. If the agency official determines that circumstances do not permit seven days for comment, the agency official shall notify the Council, the SHPO/THPO and the Indian tribe or Native Hawaiian organization and invite any comments within the time available.

(c) Local governments responsible for section 106 compliance. When a local government official serves as the agency official for section 106 compliance,

paragraphs (a) and (b) of this section also apply to an imminent threat to public health or safety as a result of a natural disaster or emergency declared by a local government's chief executive officer or legislative body, provided that if the Council or SHPO/THPO objects to the proposed action within seven days, the agency official shall comply with §§ 800.3 through 800.6.

(d) Applicability. This section applies only to undertakings that will be implemented within 30 days after the disaster or emergency has been formally declared by the appropriate authority. An agency may request an extension of the period of applicability from the Council prior to the expiration of the 30 days. Immediate rescue and salvage operations conducted to preserve life or property are exempt from the provisions of section 106 and this part.

36 C.F.R. § 800.13

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§ 800.13. Post-review discoveries

(a) Planning for subsequent discoveries.

(1) Using a programmatic agreement. An agency official may develop a programmatic agreement pursuant to § 800.14(b) to govern the actions to be taken when historic properties are discovered during the implementation of an undertaking.

(2) Using agreement documents. When the agency official's identification efforts in accordance with § 800.4 indicate that historic properties are likely to be discovered during implementation of an undertaking and no programmatic agreement has been developed pursuant to paragraph (a)(1) of this section, the agency official shall include in any finding of no adverse effect or memorandum of agreement a process to resolve any adverse effects upon such properties. Actions in conformance with the process satisfy the agency official's responsibilities under section 106 and this part.

(b) Discoveries without prior planning. If historic properties are discovered or unanticipated effects on historic properties found after the agency official has completed the section 106 process without establishing a process under paragraph (a) of this section, the agency official shall make reasonable efforts to avoid, minimize or mitigate adverse effects to such properties and:

(1) If the agency official has not approved the undertaking or if construction on an approved undertaking has not commenced, consult to resolve adverse effects pursuant to § 800.6; or

(2) If the agency official, the SHPO/THPO and any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to the affected property agree that such property is of value solely for its scientific, prehistoric, historic or archeological data, the agency official may comply with the Archeological and Historic Preservation Act instead of the procedures in

this part and provide the Council, the SHPO/THPO, and the Indian tribe or Native Hawaiian organization with a report on the actions within a reasonable time after they are completed; or

(3) If the agency official has approved the undertaking and construction has commenced, determine actions that the agency official can take to resolve adverse effects, and notify the SHPO/THPO, any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to the affected property, and the Council within 48 hours of the discovery. The notification shall describe the agency official's assessment of National Register eligibility of the property and proposed actions to resolve the adverse effects. The SHPO/THPO, the Indian tribe or Native Hawaiian organization and the Council shall respond within 48 hours of the notification. The agency official shall take into account their recommendations regarding National Register eligibility and proposed actions, and then carry out appropriate actions. The agency official shall provide the SHPO/THPO, the Indian tribe or Native Hawaiian organization and the Council a report of the actions when they are completed.

(c) Eligibility of properties. The agency official, in consultation with the SHPO/THPO, may assume a newly-discovered property to be eligible for the National Register for purposes of section 106. The agency official shall specify the National Register criteria used to assume the property's eligibility so that information can be used in the resolution of adverse effects.

(d) Discoveries on tribal lands. If historic properties are discovered on tribal lands, or there are unanticipated effects on historic properties found on tribal lands, after the agency official has completed the section 106 process without establishing a process under paragraph (a) of this section and construction has commenced, the agency official shall comply with applicable tribal regulations and procedures and obtain the concurrence of the Indian tribe on the proposed action.

36 C.F.R. § 800.14

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§ 800.14. Federal agency program alternatives

(a) Alternate procedures. An agency official may develop procedures to implement section 106 and substitute them for all or part of subpart B of this part if they are consistent with the Council's regulations pursuant to section 110(a)(2)(E) of the act.

(1) Development of procedures. The agency official shall consult with the Council, the National Conference of State Historic Preservation Officers, or individual SHPO/THPOs, as appropriate, and Indian tribes and Native Hawaiian organizations, as specified in paragraph (f) of this section, in the development of alternate procedures, publish notice of the availability of proposed alternate procedures in the Federal Register and take other appropriate steps to seek public input during the development of alternate procedures.

(2) Council review. The agency official shall submit the proposed alternate procedures to the Council for a 60–day review period. If the Council finds the procedures to be consistent with this part, it shall notify the agency official and the agency official may adopt them as final alternate procedures.

(3) Notice. The agency official shall notify the parties with which it has consulted and publish notice of final alternate procedures in the Federal Register.

(4) Legal effect. Alternate procedures adopted pursuant to this subpart substitute for the Council's regulations for the purposes of the agency's compliance with section 106, except that where an Indian tribe has entered into an agreement with the Council to substitute tribal historic preservation regulations for the Council's regulations under section 101(d)(5) of the act, the agency shall follow those regulations in lieu of the agency's procedures regarding undertakings on tribal lands. Prior to the Council entering into such agreements, the Council will provide Federal agencies notice and opportunity to comment on the proposed substitute tribal regulations.

(b) Programmatic agreements. The Council and the agency official may negotiate a programmatic agreement to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings.

(1) Use of programmatic agreements. A programmatic agreement may be used:

(i) When effects on historic properties are similar and repetitive or are multi–State or regional in scope;

(ii) When effects on historic properties cannot be fully determined prior to approval of an undertaking;

(iii) When nonfederal parties are delegated major decisionmaking responsibilities;

(iv) Where routine management activities are undertaken at Federal installations, facilities, or other land-management units; or

(v) Where other circumstances warrant a departure from the normal section 106 process.

(2) Developing programmatic agreements for agency programs.

(i) The consultation shall involve, as appropriate, SHPO/THPOs, the National Conference of State Historic Preservation Officers (NCSHPO), Indian tribes and Native Hawaiian organizations, other Federal agencies, and members of the public. If the programmatic agreement has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the agency official shall also follow paragraph (f) of this section.

(ii) Public participation. The agency official shall arrange for public participation appropriate to the subject matter and the scope of the program and in accordance with subpart A of this part. The agency official shall consider the nature of the program and its likely effects on historic properties and take steps to involve the individuals, organizations and entities likely to be interested.

(iii) Effect. The programmatic agreement shall take effect when executed by the Council, the agency official and the appropriate SHPOs/THPOs when the programmatic agreement concerns a specific region or the president of NCSHPO when NCSHPO has participated in the consultation. A programmatic agreement shall take effect on tribal lands only when the THPO, Indian tribe, or a designated representative of the tribe is a signatory to the agreement. Compliance with the procedures established by an approved programmatic agreement satisfies the agency's section 106 responsibilities for all individual undertakings of the program covered by the agreement until it expires or is terminated by the agency, the president of NCSHPO when a signatory, or the Council. Termination by an individual SHPO/THPO shall only terminate the application of a regional programmatic agreement within the jurisdiction of the SHPO/THPO. If a THPO assumes the responsibilities of a SHPO pursuant to section 101(d)(2) of the act and the SHPO is signatory to programmatic agreement, the THPO assumes the role of a signatory, including the right to terminate a regional programmatic agreement on lands under the jurisdiction of the tribe.

(iv) Notice. The agency official shall notify the parties with which it has consulted that a programmatic agreement has been executed under paragraph (b) of this section, provide appropriate public notice before it takes effect, and make any internal agency procedures implementing the agreement readily available to the Council, SHPO/THPOs, and the public.

(v) If the Council determines that the terms of a programmatic agreement are not being carried out, or if such an agreement is terminated, the agency official shall comply with subpart B of this part with regard to individual undertakings of the program covered by the agreement.

(3) Developing programmatic agreements for complex or multiple undertakings. Consultation to develop a programmatic agreement for dealing with the potential adverse effects of complex projects or multiple undertakings shall follow § 800.6. If consultation pertains to an activity involving multiple undertakings and the parties fail to reach agreement, then the agency official shall comply with the provisions of subpart B of this part for each individual undertaking.

(4) Prototype programmatic agreements. The Council may designate an agreement document as a prototype programmatic agreement that may be used for the same type of program or undertaking in more than one case or area.

When an agency official uses such a prototype programmatic agreement, the agency official may develop and execute the agreement with the appropriate SHPO/THPO and the agreement shall become final without need for Council participation in consultation or Council signature.

(c) Exempted categories.

(1) Criteria for establishing. The Council or an agency official may propose a program or category of undertakings that may be exempted from review under the provisions of subpart B of this part, if the program or category meets the following criteria:

(i) The actions within the program or category would otherwise qualify as "undertakings" as defined in § 800.16;

(ii) The potential effects of the undertakings within the program or category upon historic properties are foreseeable and likely to be minimal or not adverse; and

(iii) Exemption of the program or category is consistent with the purposes of the act.

(2) Public participation. The proponent of the exemption shall arrange for public participation appropriate to the subject matter and the scope of the exemption and in accordance with the standards in subpart A of this part. The proponent of the exemption shall consider the nature of the exemption and its likely effects on historic properties and take steps to involve individuals, organizations and entities likely to be interested.

(3) Consultation with SHPOs/THPOs. The proponent of the exemption shall notify and consider the views of the SHPOs/THPOs on the exemption.

(4) Consultation with Indian tribes and Native Hawaiian organizations. If the exempted program or category of undertakings has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the Council shall follow the requirements for the agency official set forth in paragraph (f) of this section.

(5) Council review of proposed exemptions. The Council shall review an exemption proposal that is supported by documentation describing the program or category for which the exemption is sought, demonstrating that the criteria of paragraph (c)(1) of this section have been met, describing the methods used to seek the views of the public, and summarizing any views submitted by the SHPO/THPOs, the public, and any others consulted. Unless it requests further information, the Council shall approve or reject the proposed exemption within 30 days of receipt, and thereafter notify the relevant agency official and SHPO/THPOs of the decision. The decision shall be based on the consistency of the exemption with the purposes of the act, taking into consideration the magnitude of the exempted undertaking or program and the likelihood of impairment of historic properties in accordance with section 214 of the act.

(6) Legal consequences. Any undertaking that falls within an approved exempted program or category shall require no further review pursuant to subpart B of this part, unless the agency official or the Council determines that there are circumstances under which the normally excluded undertaking should be reviewed under subpart B of this part.

(7) Termination. The Council may terminate an exemption at the request of the agency official or when the Council determines that the exemption no longer meets the criteria of paragraph (c)(1) of this section. The Council shall notify the agency official 30 days before termination becomes effective.

(8) Notice. The proponent of the exemption shall publish notice of any approved exemption in the Federal Register.

(d) Standard treatments.

(1) Establishment. The Council, on its own initiative or at the request of another party, may establish standard methods for the treatment of a category of historic properties, a category of undertakings, or a category of effects on historic properties to assist Federal agencies in satisfying the requirements of subpart B of this part. The Council shall publish notice of standard treatments in the Federal Register.

(2) Public participation. The Council shall arrange for public participation appropriate to the subject matter and the scope of the standard treatment and consistent with subpart A of this part. The Council shall consider the nature of the standard treatment and its likely effects on historic properties and the

individuals, organizations and entities likely to be interested. Where an agency official has proposed a standard treatment, the Council may request the agency official to arrange for public involvement.

(3) Consultation with SHPOs/THPOs. The Council shall notify and consider the views of SHPOs/THPOs on the proposed standard treatment.

(4) Consultation with Indian tribes and Native Hawaiian organizations. If the proposed standard treatment has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the Council shall follow the requirements for the agency official set forth in paragraph (f) of this section.

(5) Termination. The Council may terminate a standard treatment by publication of a notice in the Federal Register 30 days before the termination takes effect.

(e) Program comments. An agency official may request the Council to comment on a category of undertakings in lieu of conducting individual reviews under §§ 800.4 through 800.6. The Council may provide program comments at its own initiative.

(1) Agency request. The agency official shall identify the category of undertakings, specify the likely effects on historic properties, specify the steps the agency official will take to ensure that the effects are taken into account, identify the time period for which the comment is requested and summarize any views submitted by the public.

(2) Public participation. The agency official shall arrange for public participation appropriate to the subject matter and the scope of the category and in accordance with the standards in subpart A of this part. The agency official shall consider the nature of the undertakings and their likely effects on historic properties and the individuals, organizations and entities likely to be interested.

(3) Consultation with SHPOs/THPOs. The Council shall notify and consider the views of SHPOs/THPOs on the proposed program comment.

(4) Consultation with Indian tribes and Native Hawaiian organizations. If the program comment has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or

Native Hawaiian organization, the Council shall follow the requirements for the agency official set forth in paragraph (f) of this section.

(5) Council action. Unless the Council requests additional documentation, notifies the agency official that it will decline to comment, or obtains the consent of the agency official to extend the period for providing comment, the Council shall comment to the agency official within 45 days of the request.

(i) If the Council comments, the agency official shall take into account the comments of the Council in carrying out the undertakings within the category and publish notice in the Federal Register of the Council's comments and steps the agency will take to ensure that effects to historic properties are taken into account.

(ii) If the Council declines to comment, the agency official shall continue to comply with the requirements of §§ 800.3 through 800.6 for the individual undertakings.

(6) Withdrawal of comment. If the Council determines that the consideration of historic properties is not being carried out in a manner consistent with the program comment, the Council may withdraw the comment and the agency official shall comply with the requirements of §§ 800.3 through 800.6 for the individual undertakings.

(f) Consultation with Indian tribes and Native Hawaiian organizations when developing program alternatives. Whenever an agency official proposes a program alternative pursuant to paragraphs (a) through (e) of this section, the agency official shall ensure that development of the program alternative includes appropriate government-to-government consultation with affected Indian tribes and consultation with affected Native Hawaiian organizations.

(1) Identifying affected Indian tribes and Native Hawaiian organizations. If any undertaking covered by a proposed program alternative has the potential to affect historic properties on tribal lands, the agency official shall identify and consult with the Indian tribes having jurisdiction over such lands. If a proposed program alternative has the potential to affect historic properties of religious and cultural significance to an Indian tribe or a Native Hawaiian organization which are located off tribal lands, the agency official shall identify those Indian tribes and Native Hawaiian organizations that might attach religious and cultural significance to such properties and consult with them. When a proposed

program alternative has nationwide applicability, the agency official shall identify an appropriate government to government consultation with Indian tribes and consult with Native Hawaiian organizations in accordance with existing Executive orders, Presidential memoranda, and applicable provisions of law.

(2) Results of consultation. The agency official shall provide summaries of the views, along with copies of any written comments, provided by affected Indian tribes and Native Hawaiian organizations to the Council as part of the documentation for the proposed program alternative. The agency official and the Council shall take those views into account in reaching a final decision on the proposed program alternative.

36 C.F.R. § 800.16

Title 36. Parks, Forests, and Public Property
Chapter VIII. Advisory Council on Historic Preservation
Part 800. Protection of Historic Properties
Subpart B. The Section 106 Process

§ 800.16. Definitions

(a) Act means the National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470–470w–6.

(b) Agency means agency as defined in 5 U.S.C. 551.

(c) Approval of the expenditure of funds means any final agency decision authorizing or permitting the expenditure of Federal funds or financial assistance on an undertaking, including any agency decision that may be subject to an administrative appeal.

(d) Area of potential effects means the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.

(e) Comment means the findings and recommendations of the Council formally provided in writing to the head of a Federal agency under section 106.

(f) Consultation means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process. The Secretary's “Standards and Guidelines for Federal Agency Preservation Programs pursuant to the National Historic Preservation Act” provide further guidance on consultation.

(g) Council means the Advisory Council on Historic Preservation or a Council member or employee designated to act for the Council.

(h) Day or days means calendar days.

(i) Effect means alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register.

(j) Foreclosure means an action taken by an agency official that effectively precludes the Council from providing comments which the agency official can meaningfully consider prior to the approval of the undertaking.

(k) Head of the agency means the chief official of the Federal agency responsible for all aspects of the agency's actions. If a State, local, or tribal government has assumed or has been delegated responsibility for section 106compliance, the head of that unit of government shall be considered the head of the agency.

(l)(1) Historic property means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria.

(2) The term eligible for inclusion in the National Register includes both properties formally determined as such in accordance with regulations of the Secretary of the Interior and all other properties that meet the National Register criteria.

(m) Indian tribe means an Indian tribe, band, nation, or other organized group or community, including a native village, regional corporation, or village corporation, as those terms are defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(n) Local government means a city, county, parish, township, municipality, borough, or other general purpose political subdivision of a State.

(o) Memorandum of agreement means the document that records the terms and conditions agreed upon to resolve the adverse effects of an undertaking upon historic properties.

(p) National Historic Landmark means a historic property that the Secretary of the Interior has designated a National Historic Landmark.

(q) National Register means the National Register of Historic Places maintained by the Secretary of the Interior.

(r) National Register criteria means the criteria established by the Secretary of the Interior for use in evaluating the eligibility of properties for the National Register (36 CFR part 60).

(s)(1) Native Hawaiian organization means any organization which serves and represents the interests of Native Hawaiians; has as a primary and stated purpose the provision of services to Native Hawaiians; and has demonstrated expertise in aspects of historic preservation that are significant to Native Hawaiians.

(2) Native Hawaiian means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

(t) Programmatic agreement means a document that records the terms and conditions agreed upon to resolve the potential adverse effects of a Federal agency program, complex undertaking or other situations in accordance with § 800.14(b).

(u) Secretary means the Secretary of the Interior acting through the Director of the National Park Service except where otherwise specified.

(v) State Historic Preservation Officer (SHPO) means the official appointed or designated pursuant to section 101(b)(1) of the act to administer the State historic preservation program or a representative designated to act for the State historic preservation officer.

(w) Tribal Historic Preservation Officer (THPO) means the tribal official appointed by the tribe's chief governing authority or designated by a tribal ordinance or preservation program who has assumed the responsibilities of the SHPO for purposes of section 106 compliance on tribal lands in accordance with section 101(d)(2) of the act.

(x) Tribal lands means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.

(y) Undertaking means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.

(z) Senior policy official means the senior policy level official designated by the head of the agency pursuant to section 3(e) of Executive Order 13287.

40 C.F.R. § 1502.13

Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1502. Environmental Impact Statement

§ 1502.13. Purpose and need

The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.

40 C.F.R. § 1502.14

Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1502. Environmental Impact Statement

§ 1502.14. Alternatives including the proposed action

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

40 C.F.R. § 1502.21

Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1502. Environmental Impact Statement

§ 1502.21. Incorporation by reference

Agencies shall incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk without impeding agency and public review of the action. The incorporated material shall be cited in the statement and its content briefly described. No material may be incorporated by reference unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment. Material based on proprietary data which is itself not available for review and comment shall not be incorporated by reference.

40 C.F.R. § 1506.1

Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1506. Other Requirements of NEPA

§ 1506.1. Limitations on actions during NEPA process

(a) Until an agency issues a record of decision as provided in § 1505.2 (except as provided in paragraph (c) of this section), no action concerning the proposal shall be taken which would:

(1) Have an adverse environmental impact; or

(2) Limit the choice of reasonable alternatives.

(b) If any agency is considering an application from a non-Federal entity, and is aware that the applicant is about to take an action within the agency's jurisdiction that would meet either of the criteria in paragraph (a) of this section, then the agency shall promptly notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved.

(c) While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:

(1) Is justified independently of the program;

(2) Is itself accompanied by an adequate environmental impact statement; and

(3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.

(d) This section does not preclude development by applicants of plans or designs or performance of other work necessary to support an application for Federal, State or local permits or assistance. Nothing in this section shall preclude Rural Electrification Administration approval of minimal expenditures not affecting the

environment (e.g. long leadtime equipment and purchase options) made by non-governmental entities seeking loan guarantees from the Administration.

40 C.F.R. § 1506.1

Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1506. Other Requirements of NEPA

§ 1506.2. Elimination of duplication with state and local prcedures

(a) Agencies authorized by law to cooperate with State agencies of statewide jurisdiction pursuant to section 102(2)(D) of the Act may do so.

(b) Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include:

(1) Joint planning processes.

(2) Joint environmental research and studies.

(3) Joint public hearings (except where otherwise provided by statute).

(4) Joint environmental assessments.

(c) Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and comparable State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include joint environmental impact statements. In such cases one or more Federal agencies and one or more State or local agencies shall be joint lead agencies. Where State laws or local ordinances have environmental impact statement requirements in addition to but not in conflict with those in NEPA, Federal agencies shall cooperate in fulfilling these requirements as well as those of Federal laws so that one document will comply with all applicable laws.

(d) To better integrate environmental impact statements into State or local planning processes, statements shall discuss any inconsistency of a proposed action with any approved State or local plan and laws (whether or not federally sanctioned). Where

an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law.

FEDERAL REGISTER

Vol. 65, No. 239

Rules and Regulations

ADVISORY COUNCIL ON HISTORIC PRESERVATION

36 CFR Part 800

RIN 3010-AA05

Protection of Historic Properties

Part II

65 FR 77698

DATE: Tuesday, December 12, 2000

ACTION: Final rule; revision of current regulations.

[*77698]

SUMMARY: The Advisory Council on Historic Preservation is publishing its final rule, replacing the previous rule which implemented the 1992 amendments to the National Historic Preservation Act (NHPA), and improved and streamlined the rule in accordance with the Administration's reinventing government initiatives and public comment. Litigation earlier this year challenged that previous rule. This rulemaking has addressed questions and concerns raised by that litigation, and has given the public a chance to provide input to determine how the rule has operated and revise the rule as appropriate. The final rule modifies the process by which Federal agencies consider the effects of their undertakings on historic properties and provide the Council with a reasonable opportunity to comment with regard to such undertakings, as required by section 106 of the NHPA. The Council has sought to better balance the interests and concerns of various users of the section 106 process, including Federal agencies, State Historic Preservation Officers (SHPOs), Tribal Historic Preservation Officers (THPOs), Native Americans and Native Hawaiians, industry, and the public.

DATES: This final rule is effective January 11, 2001.

FOR FURTHER INFORMATION CONTACT: If you have questions about the rule, please call Frances Gilmore or Paulette Washington at the regulations hotline (202) 606-8508, or e-mail us at regs@achp.gov. When calling or sending e-mail, please state your name, affiliation, and nature of your question, so your call or e-mail can then be routed to the correct staff person. Informational materials about the new rule will be posted on our web site (http://www.achp.gov) as they are developed.

SUPPLEMENTARY INFORMATION: The information that follows has been divided into five sections. The first one provides background information introducing the agency and summarizing the history of the rulemaking process. The second section highlights the changes incorporated into the final rule. The third section describes, by section and topic, the Council's response to public comments on this rulemaking. The fourth section provides a description of the meaning and intent behind specific sections of the final rule. Finally, the fifth section provides the impact analysis section, which addresses various legal requirements, including the Regulatory Flexibility Act, the Paperwork Reduction Act, the National Environmental Policy Act, the Unfunded Mandates Act, the Congressional Review Act and various relevant Executive Orders.

I. Background

The Advisory Council on Historic Preservation ("Council") is the major policy advisor to the Government in the field of historic preservation. Twenty members make up the Council. The President appoints four members of the general public, one Native American or Native Hawaiian, four historic preservation experts, and one governor and one mayor. The Secretary of the Interior and the Secretary of Agriculture, four other Federal agency heads designated by the President, the Architect of the Capitol, the chairman of the National Trust for Historic Preservation and the president of the National Conference of State Historic Preservation Officers complete the membership.

This final rule sets forth the revised section 106 process. Section 106 of the National Historic Preservation Act of 1966, as amended, *16 U.S.C. 470f* (NHPA), requires Federal agencies to take into account the effect of their undertakings on properties included in or eligible for inclusion in the National Register of Historic Places and to afford the Council a reasonable opportunity to comment on such undertakings.

Through Section 211 of the National Historic Preservation Act, the Council is authorized to "promulgate such rules and regulations as it deems necessary to govern the implementation of section 106 * * * in its entirety."

After publishing two Notices of Proposed Rulemaking *(59 FR 50396,* October 3, 1994; and *61 FR 48580,* September 13, 1996), the Council published a final rule setting forth a revised process implementing section 106 in its entirety *(64 FR 27044-27084,* May 18, 1999). Such rule went into effect on June 17, 1999, and superseded the rule previously issued in 1986.

Two major forces behind that revision process were the 1992 amendments to the National Historic Preservation Act (NHPA), and the Administration's reinventing government efforts. In October, 1992, Public Law 102-575 amended the NHPA and affected the way section 106 review is carried out. Among other things, the 1992 amendments:

1. Clarified that "[p]roperties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register." *16 U.S.C. 470a*(d)(6)(A);

2. Required that "[i]n carrying out its responsibilities under section 106, a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to properties described" above. *16 U.S.C. 470a*(d)(6)(B). Also see *36 CFR 800.2(c)(3)* (granting such tribes and Native Hawaiian organizations, "consulting party" status in the section 106 process). Implementation of this statutory consultation requirement is found throughout the proposed rule. See, for example, *36 CFR 800.3(f)(2), 800.4(a)(4), 800.4(b), 800.4(c)(1), 800.5(a), 800.6(a)*-(b).

3. Added a provision in the NHPA prohibiting Federal agencies from granting a license or assistance to applicants who, with the intent to avoid the requirements of section 106, significantly adversely affected historic properties related to the license or assistance. In such cases, the Federal agency can only grant the license or assistance if it determines, after consulting with the Council, that circumstances justify granting the license or assistance despite the effects to the historic property. *16 U.S.C. 470h-2*(k). See *36 CFR 800.9(c).*

4. Explicitly recognized the long-standing practice of having Federal agencies develop agreements to address adverse effects of their undertakings to historic properties. This practice had also been recognized in the earlier, 1980 amendments, where Section 205(b) of the NHPA was changed to state that the Council could be represented in court by its General Counsel regarding "enforcement of agreements with Federal agencies." It also clarified that where such an agreement is not reached, the head of the relevant Federal agency must document his/her decision pursuant to section 106. Such agency head cannot delegate that responsibility. It also provided that agreements executed pursuant to the

section 106 process would govern the relevant Federal undertaking and all its parts. *16 U.S.C. 470h-2*(l). See *36 CFR 800.6, 800.7.*

5. Added a member to the Council. This Council member would be a Native [*77699] American or Native Hawaiian appointed by the President. *16 U.S.C. 470i*(a)(11).

6. Explicitly clarified the fact that the Council has authority to "promulgate such rules and regulations as it deems necessary to govern the implementation of section 106 of this Act *in its entirety*." *16 U.S.C. 470s* (emphasis added) (highlighted text was added by the 1992 amendments); and

7. Amended the definition of the term "undertaking," by adding "[projects, activities, and programs] subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency" to the list of actions constituting an "undertaking." *16 U.S.C. 470w*(7)(D). The amended, statutory definition of "undertaking" was adopted verbatim in the rule. *36 CFR 800.16(y).*

Additionally, as part of the Administration's National Performance Review and overall regulatory streamlining efforts, the Council undertook a review of its regulatory process to identify potential changes that could improve the operation of the section 106 process and conform it to the principles of the Administration. A description of the Council's revision efforts from 1992, which led to the final rule that went into effect in 1999 ("1999 rule"), is found in its preamble *(64 FR 27044-27084,* May 18, 1999). That preamble extensively details its history, purpose, intent, and response to public comment.

On February 15, 2000, the National Mining Association ("NMA") filed a lawsuit challenging the 1999 rule. Among other things, the lawsuit alleged violations of the Appointments Clause of the Constitution and certain provisions of the Administrative Procedure Act pertaining to rulemaking. After assessing the allegations contained in the lawsuit, the Council decided to move forward with the present rulemaking process that culminates today with this final rule. The Council believed that this rulemaking would provide an opportunity to address assertions about the procedural adequacy of the promulgation of the 1999 rule, including those about the participation of the National Trust for Historic Preservation ("Trust") and the National Conference of State Historic Preservation Officers ("NCSHPO"), as Council members, in the adoption of the final, revised rule. It would also give the public a chance to provide input to determine how the rule has operated and revise the rule as appropriate. This rulemaking does not evidence Council agreement with the merits of the allegations but, rather, the Council's desire to remove these issues from litigation.

Accordingly, at the June 23, 2000 Council meeting in Maine, the Chairman of the Council asked the Council members to take two actions. The first action was a new vote on the adoption of the 1999 rule, without the participation of the Trust and NCSHPO. The Council members voted 16-0 in favor of the 1999 rule, with the Trust and NCSHPO voluntarily recusing themselves from the vote and any deliberation on it.

The second action was a vote on undertaking the present rulemaking process, using the text of the 1999 rule as the proposed rule. Again, the Council members voted in favor of moving forward with the rulemaking by a vote of 16-0, with the Trust and NCSHPO voluntarily recusing themselves from the vote and any deliberation on it. Accordingly, on July 11, 2000 the Council published a proposed rule for public comment *(65 FR 42833-42849).*

The public was given a 30-day period, until August 10, in which to comment on the proposed rule. All those who filed a timely request for an extension of the comment period were given until August 31 to submit their comments. We believe the extension granted was reasonable in light of the circumstances.

As stated above, the text of the proposed rule submitted for public comment was the same as the one for the final rule that had been in effect for more than a year. That final rule, in turn, was the product of a rulemaking process that afforded the public ample opportunity, throughout six years, to participate and comment. The preamble of that 1999 final rule (found at *64 FR 27044-27084,* May 18, 1999) extensively details its history, purpose, intent, and response to public comment. It is a lengthy document and will not be re-printed here.

After the close of the public comment period, the Council, minus the Trust and NCSHPO, considered the comments and incorporated changes into a draft rule as was deemed appropriate. On November 17, 2000, the Council voted on whether to adopt the draft rule as a final rule. As stated before, the Council members representing the Trust and NCSHPO had already recused themselves from the rulemaking process and proposed suspension. They accordingly removed themselves from the table and took no part in the deliberations and vote on this matter.

The Council voted to adopt the draft rule as the final rule now being published, by a vote of 17 for, 1 abstention, and none against.

The Council reiterates that the Trust and NCSHPO did not participate in any way whatsoever in the deliberations, decisions, votes, or any other Council activities regarding this rulemaking. Their only participation in this rulemaking took the form of a written comment filed by NCSHPO on the proposed rule. Such comment was submitted by NCSHPO, as a member of the general public, during the commenting period provided by the notice of proposed rulemaking.

II. Highlights of Changes

The Council retained the core elements of the section 106 process that have been its hallmark since 1974. The Council also retained the major streamlining improvements that were adopted in June, 1999. Changes adopted were primarily modifications to remove operational impediments in the process and clarifications of certain provisions and terms. In addition, a number of technical and informational edits were made throughout the rule. Major changes are as follows:

1. Clarification of the Role of State Historic Preservation Officers.

Section 800.2(c)(1) was amended to acknowledge the statutory responsibility of SHPOs to cooperate with agencies, local governments, and organizations and individuals to ensure that historic properties are considered in planning.

2. Clarification of the Role of Indian Tribes and Tribal Historic Preservation Officers

Section 800.2(c)(2) was completely rewritten to better distinguish the roles of Indian tribes that had assumed the responsibilities of SHPOs on their tribal lands under section 101(d)(2) of the Act from that of Indian tribes which had not. The Council notes that these amendments do not change the substantive role of non-101(d)(2) Tribes or any other party in the section 106 process under the proposed rule, but simply provide for a clearer rule. Section 800.2(c)(2)(ii) was also amended to clarify that the Act requires agency consultation with Indian tribes and Native Hawaiian organizations that attach religious and cultural significance to historic properties regardless of whether the historic properties are located on or off tribal land. Section 800.2(c)(2)(ii)(B) was amended to better reflect the sovereignty of Indian tribes over their tribal lands. [*77700]

3. More Flexibility To Involve Applicants

Section 800.2(c)(5) was amended to resolve a major problem regarding the participation of applicants for Federal assistance or permission in the Section 106 process. Under the change, an agency may authorize a group of applicants to initiate the section 106 process, rather than being required to grant individual authorizations. Language was also added to clarify that such authorizations do not relieve the Federal agency of its obligations to conduct government-to-government consultation with Indian tribes.

4. Clarification of Undertakings Covered by the Section 106 Process

Section 800.3(a)(1) was amended to better state the premise of the rule that only an undertaking that presents a type of activity that has the potential to affect historic properties requires review. The previous language implied that making such a determination related to the circumstances of the particular undertaking, rather than the more generic analysis of whether the type of undertaking had the potential to affect historic properties.

5. Reinforcement of the Federal Agency's Responsibilities in Identifying Historic Properties

Section 800.4(a) was amended to assert that determinations in this subsection are made unilaterally by the Agency Official, after consultation with SHPO/THPO. Some had misunderstood the previous version as providing for consensus determinations.

6. Revision of the Role of Invited Signatories

Section 800.6(c)(2) was rewritten to remove confusion about the ability of the Federal agency to invite other parties to become formal signatories to Memoranda of Agreement and to clarify their rights and responsibilities as invited signatories. Also regarding memoranda of agreement, § 800.6(c)(8) was amended to provide that the option for their ter-

mination exists not only when one party simply cannot comply with its terms, but also when the terms are not being followed for whatever reason.

7. Revision of the Use of Environmental Impact Statements (EIS) To Comply With Section 106

Section 800.8(c)(4) was rewritten to more clearly state the actions a Federal agency must take in making a binding commitment in an NEPA documents to carry out measures to avoid, minimize or mitigate adverse effects and thereby use the NEPA process to comply with section 106 requirements.

8. Redefinition of the Role of the Council When Improving the Operation of Section 106

Section 800.9(d)(2) was amended to require the Council to participate in section 106 reviews in a manner parallel to SHPOs/THPOs when the Council decides to join individual case reviews it would not otherwise engage in. This occurs when the Council has determined that section 106 responsibilities are not being properly carried out by an agency or SHPO/THPO and the Council's participation can remedy the problem.

9. Modification of Documentation Standards

Section 800.11(a) was amended to state that a Federal agency's responsibility to provide documentation was limited by legal authority and the availability of funds. Section 800.11(c)(2) was also amended to require Federal agencies to include the views of the SHPO/THPO when consulting with the Council on withholding confidential information.

10. Inclusion of National Register Eligibility Assessment in Consideration of Post-Review Discoveries

Section 800.13(b)(3) was amended to add a requirement that a Federal agency seeking expedited section 106 review for properties discovered after approval of an undertaking provide information on the eligibility of affected properties for the National Register.

11. Increased Flexibility for Programmatic Agreements

Section 800.14(b) was amended by the addition of a new section authorizing the Council to create "prototype programmatic agreements" which could be executed by a Federal agency and an SHPO/THPO without Council participation. This would permit routine programmatic agreements that follow an accepted model to be completed more expeditiously.

12. Improved Consideration of Stakeholder and Public Views on Proposed Exemptions

Section 800.14(c)(5) was amended to add Council consideration of the views of SHPOs/THPOs and others consulted when determining whether to approve an exemption from the section 106 process. The Council was also required to notify the agency and SHPOs/THPOs of it decision on the requested exemption.

13. More Flexibility for Federal Agencies When Consulting With Indian Tribes on Nationwide Program Alternatives

Section 800.14(f) was amended to reemphasize a Federal agency's obligation under various authorities to consult with Indian tribes and Native Hawaiian organizations when developing nationwide program alternatives, but to acknowledge that it is the agency's responsibility to determine the appropriate means of meeting those obligations.

III. Response to Public Comments

Following is a summary of the public comments received in response to the notice of proposed rulemaking, along with the Council's response. The public comments are printed in bold typeface, while the Council response follows immediately in normal typeface. They are organized according to the relevant section of the proposed rule or their general topic.

Section 800.1

The Council should expand the definition of SHPO responsibilities beyond cooperation with the Secretary, Advisory Council and Federal agencies to include explicit reference to organizations and individuals, such as regulatees and their consultants. The Council noted that such language was warranted by the NHPA, and therefore inserted language regarding such SHPO duties per section 101(b)(3)(F) of the NHPA.

The very last sentence of this section should be changed to: "The Agency Official is encouraged to initiate the section 106 process as early as practicable in the undertaking's planning so that it may consider impacts on historic resources." The language on the proposed rule stated that the Agency Official "shall ensure that the section 106 process is initiated early in the undertaking's planning * * *" The Council disagreed with the commenter's proposed change since it is crucial that agencies initiate the section 106 process at a point where alternatives have not yet been foreclosed. Otherwise, the review would be rendered meaningless.

Council is urged to preserve flexibility provision under the 1986 regulations, which stated: "The Council recognizes that the procedures for the Agency Official set forth in these regulations may be implemented by the Agency Official in a flexible manner reflecting different program requirements, as long as the purposes of section 106 of the Act and these regulations are met." Specific areas of [*77701] flexibility are incorporated in the proposed rule to embody the general flexibility term found in the 1986 rule. Among these are: phased identification, compression of steps, NEPA coordination, and the various program alternatives under § 800.14 of the rule.

Section 800.2(a)

The regulations should state that Federal agencies that authorize applicants to initiate consultation are still responsible for their government to government relationships with tribes. The Council agreed and incorporated such change at § 800.2(c)(5) since the statement comports with Executive Orders and Memoranda regarding the government-to-government responsibilities of Federal agencies towards federally recognized tribes.

Requirements of § 800.14 preclude implementation of § 800.2(a) insofar as it calls for utilization of the agency's existing procedures to fulfill consultation requirements. The Council disagreed. The comment failed to consider the difference between procedures that implement 36 CFR part 800 (those under § 800.2(a)) and procedures that actually substitute/modify the process under 36 CFR part 800 (those under § 800.14).

Nothing in NHPA requires Federal agencies to consult with a particular party, thus, while such consultation may be beneficial, it should be left to the discretion of the Federal agency under NHPA. The Council not only believes that such consultation is beneficial, but it also believes it has the required authority to justify this and all other sections of the proposed rule. Consultation occurs in the section 106 process propounded by the rule in a way that is fully consistent with the statute. See, for example, the statutory language under section 101 of the NHPA regarding SHPO and THPO assistance to Federal agencies in the section 106 process, the consultation requirements with Indian tribes and Native Hawaiian organizations under the 1992 amendments to the NHPA, and language under Section 110 of the NHPA ensuring that public involvement occurs in the section 106 process. Such consulting entities have the specialized knowledge and interest that Federal agencies may lack. Consultation with these parties provides the Federal agency with the information it needs to make reasoned assessment of how its undertakings affect historic properties. Furthermore, it is clear to the Council through its years of experience, that such consultation is necessary and that Federal agencies heavily rely on such assistance (in particular that of the SHPOs). Please also refer to responses given under the legal topics.

Federal officials (and not State, local or tribal government officials) are responsible for taking into account the effects of their undertakings on historic properties. Furthermore, it is inappropriate to mention Section 112 of the NHPA in this section since the Council has no authority to enforce it. The Council agrees that the responsibility for section 106 compliance lies with Federal agencies, including the "take into account" responsibility. The Council clarifies that section 112 is merely restated in the rule for reference purposes (as opposed to enforcement).

ACHP refusal to take a position regarding delegation of authority have resulted in SHPOs disregarding FCC's jurisdiction and emphasizes on enforcement over historic preservation. During the time frame of this rulemaking, the Council issued a memorandum to the FCC, all SHPOs and the telecommunications industry clarifying its position on delegations of authority. This and several other issues mentioned by the telecommunications industry in this rulemaking process have been or are in the process of being addressed through ongoing discussions with the industry, the FCC and SHPOs. These discussions commenced before the present rulemaking process. Such ongoing discussions are referred hereinafter as "Telecommunications Working Group."

Although section 101 of the NHPA establishes an advisory role for SHPOs to assist Federal agencies, the rules fail to establish consistent objective standards for SHPOs to apply in carrying out their duties. It undermines the ability of SHPOs and Federal agencies to adequately serve the Council's goal of protecting historic properties. The Council believes that the rule contains adequate standards that guide SHPOs in carrying out their functions. These standards can be found in various parts of the rule (e.g., criteria of adverse effect under § 800.5(a), and

various definitions of terms under § 800.16). Further standards, such as the National Register Criteria of Eligibility (36 CFR part 63), are referenced in the present rule, and guide SHPO duties. Furthermore, pursuant to the NHPA, the Department of the Interior regularly reviews SHPO programs and ensures such programs and their personnel have the necessary expertise to guide their performance of their statutory duties, which include "to consult with * * * Federal agencies * * * on Federal undertakings that may affect historical properties." *16 U.S.C. 470a*(b)(3)(I).

"Delegation authority" should be expanded to include "approved" state agencies and other pre-approved designees to conduct section 106 coordination on behalf of the Agency Official. The Council disagrees since the comment fails to realize that such authority can only come through statute. Congress specifically placed section 106 compliance responsibilities on Federal agencies. Only Congress can shift that responsibility. The Council is only aware of certain Department of Housing and Urban Development programs containing such a statutory delegation.

Section 800.2(b)

Licensees should be recognized as consulting parties under the regulations. Applicants for licenses, permits, approvals or assistance are specifically listed in the rule as consulting parties (see §§ 800.2(c)(5) and 800.3(f)(1)).

Add the following to § 800.2(b)(2): "Within 30 days of receipt of a request for such advise, the Council shall reply in writing with advise, or it shall reply in writing that it will not offer advice stating its reason(s) for so doing." This is needed to ensure Council responds in a timely fashion. The Council disagreed with this proposal. Time limits, and the consequences of not replying in time, are already specified in the proposed rule as needed.

Section 800.2(c)

Remove the first sentence of § 800.2(c)(1)(I). It is unrealistic to charge the SHPO with "reflecting the interests of the State and its citizens in the preservation of their cultural heritage." This only encourages agencies to treat SHPO coordination as the be-all and end-all of consultation, even where large numbers of a State's citizens violently disagree with a SHPO position. The rule reasonably supports the idea that the SHPO reflects the interests of the State by virtue of being a State official appointed by the elected State Governor.

Several comments requested that the rule distinguish the roles of Tribes that have an approved "Tribal Historic Preservation Officer' (THPO) pursuant to section 101(d)(2) of the NHPA, and those that do not. The use of the term "THPO" for both was deemed to be highly confusing. As stated in the highlight of changes above, § 800.2(c)(2) was completely rewritten to better distinguish the roles of Indian tribes that had assumed the responsibilities of SHPOs on their tribal lands under section 101(d)(2) of the Act from that of Indian tribes which had not. The Council notes that these amendments do [*77702] not change the substantive role of non-101(d)(2) Tribes or any other party in the section 106 process of the proposed rule, but simply provide for a clearer rule.

Many THPO's have construed this provision to mean that they must be invited to participate as "consulting parties" on all undertakings affecting properties of traditional religious and cultural importance, a position at odds with the NHPA. It is requested that the role of tribal representatives and THPO's in consultation off tribal land to be clarified consistent with the statute. The Council believes that section 101(d)(6)(B) of the NHPA clearly gives federally recognized tribes and Native Hawaiian organizations a right to be consulted regarding historic properties of religious and cultural significance to them. The cited section of the statute does not qualify that right depending on whether the historic property is located on or off tribal lands. It also does not qualify that right depending on whether the tribe has a THPO certified pursuant to section 101(d)(2) of the NHPA.

Too difficult to implement requirements of § 800.2(c)(2) when the project is not on reservation land. It is unreasonable for each Federal agency to develop on their own information as to which tribe(s) may be associated with specific geographic areas. While the Council acknowledges certain initial difficulties in identifying tribes to consult outside tribal lands, it believes the statute is clear in mandating such consultation regardless of the location of the historic property. The Council and the National Park Service are currently conducting a guidance project to assist agencies in identifying Indian tribes to be consulted.

Regulations do not create a "consultative" role for SHPO staff who would prefer to spend their time and efforts preserving historic properties rather than enforcing procedures on telecommunications projects. The SHPOs have a specific statutory duty to consult with Federal agencies and assist them with their section 106 duties. *16 U.S.C. 470a*(b)(3)(I). Moreover, the SHPOs do spend their time directly preserving historic properties through their involvement in the section 106 process. The Council has not received contrary views from any SHPOs. Finally, similar

issues of SHPO/telecommunications industry work in the section 106 process is being addressed by the ongoing Telecommunications Working Group.

Definition of "additional consulting parties" is too open ended, since it makes it possible for anyone who can claim a "concern" to become a consulting party, adding delays and expenses to the process (§ 800.2(c)(6)). Even if Council had authority over this issue, at a minimum the rule should require a demonstration of some form of protectable interest similar to the concept of legal standing. Standards for additional consulting parties adequately balance the project's need for expediency and the right of those with defined interests in getting involved in the process. To ensure this provision is not abused, the rule gives the Agency Official the ultimate discretion to invite additional consulting parties or not. The Council believes the Agency Official is in a better position to balance the benefits of including these parties against the costs of so doing. The Agency Official will be able to do this on a case by case basis, according to the particulars of the specific undertaking at issue.

Use of the phrase "SHPO/THPO" has led to misunderstandings concerning the different regulatory roles of the SHPOs and THPOs in consultation on projects located off tribal lands. Guidance is needed to clarify these roles. The Council believes the rule is clear in that Federally recognized tribes have to be consulted regarding historic properties of cultural and religious significance to them, regardless of the location of such properties. With the changes regarding the use of the term THPO, there should be no confusion as to consultative rights of tribes.

Expanded definition of consulting parties has made it difficult and time consuming for agency officials to establish an appropriate consultation process. Guidelines for determining formal consulting parties should be developed. The Council believes that §§ 800.2 and 800.3(f) set forth clear standards for who should be a consulting party, and a clear process for who makes the determination and when. A further expansion on this topic to aid Federal agencies is better suited for guidance.

Regulations give tribes a secondary role to SHPOs with respect to tribal cultural and sacred properties which are not on tribal lands. The 1992 Amendments were intended to provide tribes with rights at least equivalent to SHPOs regardless of where the properties are located. Tribes want same consultation rights as SHPO for tribal cultural properties located off tribal lands. SHPO role is a creation of the regulations and is not required in the Act. The Council does not believe that Tribes have a secondary role to SHPOs. They do have a different role however. The rule recognizes that Tribes are entitled to consult regarding historic properties of religious and cultural significance to them that may be affected by an undertaking. The SHPO is also entitled to consult, consistent with the definition of SHPO responsibilities in the Act, regarding historic properties. *16 U.S.C. 470a*(b)(3).

The regulations assume that the THPO is a regulatory/executive body of a tribal government. Federal agencies believe that consulting with the THPO or tribal cultural resource manager fulfills the government-to-government responsibility. Agencies need to become familiar with this responsibility. The regulations fail to address or identify the process for government-to-government consultation. It is the duty of the relevant Federal agency (and not the Council) to specify how they meet their government-to-government responsibilities. See Executive Memorandum on Government-to-Government Relations with Native American Governments, dated April 29, 1994.

Granting SHPOs a role on tribal lands where there is no 101(d)(2) THPO is an intrusion on tribal sovereignty and is hypocritical since tribes are not given an equivalent role for their traditional cultural and sacred properties off tribal lands. The Council disagrees. Tribes that attach religious and cultural significance to historic properties must be invited to consult, regardless of where the property is located. The proposed rule follows statutory roles given to Tribes and SHPOs. See *16 U.S.C. 470a* in general, and 470a(d)(2)(D)(iii).

The regulations provide a significant role for the THPO, above the tribal government leader. Federal agencies now have an "out" to avoid the government-to-government responsibility. Agencies need to learn, and ACHP trainers need to emphasize, the difference. The regulations should include a section that requires agencies to develop a process that recognizes the THPO role. The Council reasonably assumes 101(d)(2) THPOs are the appropriate contact for government to government relations. Nevertheless, the Council will confirm this statement with the Department of the Interior.

800.2(c)(3)(vi) is confusing. This allows for the SHPO and Council to ignore and avoid tribal involvement. It also provides an outlet for Federal agencies to disregard Federal law, E.O.s, etc. Finally, the SHPO then becomes a decision maker on tribal lands. This provision was requested by Tribal comments that wanted to avoid Tribes being required to sign an agreement if they chose not to sign it. A [*77703] waiver under § 800.2(c)(3)(vi) requires positive action from the Tribe, and therefore does not present a loophole to be used by Federal agencies or any other entities.

A tribe that does not have a 101(d)(2) THPO does not have the same authority as a tribe that does. This gives the SHPO the ability to come onto reservation lands and dictate how the tribe handles its preservation program and individual projects. Would like the regulations to provide tribes the option of inviting the SHPO into consultation on tribal lands. Section 101(d)(2) of the NHPA provides for THPO substitution of the SHPO on tribal lands if approved by DOI. If there is no approved 101(d)(2) THPO, NHPA provides that the SHPO shall consult with Federal agencies on any undertaking within the State. Also, NHPA specifically states the right of private owners of land within tribal boundaries to request SHPO involvement in undertakings on tribal lands. See section 470a(d)(2)(D)(iii) of NHPA.

Change last sentence to: Nothing in this part alters, repels, interprets, or modifies tribal sovereignty or preempts, modifies, or limits the exercise of any such rights. This change would delete "is intended to..." The Council agreed with such a change since it was needed to more properly accord with tribal sovereign rights and the original intent of the section.

Section 800.2(c)(5)

Several comments requested that the rule be changed so that Federal agencies will not be required to give specific authorization for each applicant to initiate consultation with SHPO/THPOs. The Council supported amending the proposed rule to allow agencies to authorize applicants to initiate consultation on a broader basis than individual authorizations.

Because of the time and resources required to consult with Tribes, more Federal agencies are delegating their consultation responsibilities, without guidance, to consultants, applicants and others. Many tribes, however, refuse to interact with parties other than the Federal agency or agency director. The Council responds to this concern by clarifying that such insistence is due to the Federal agencies' government-to-government responsibilities under Executive Orders and Memoranda.

Delegating authority to applicants is delegating Federal agency responsibility. This process lacks the integrity of upholding the intent of laws and EOs. Generally, tribes are insisting on formal consultation with Federal agencies, not applicants. Federal agencies are required to consult with Indian Tribes on a government-to-government basis pursuant to Executive Orders, Presidential memoranda, and other authorities. The proposed rule therefore was amended to acknowledge this responsibility. The authorization to applicants to initiate consultation does not include consultation with Tribes.

Section 800.2(d)

Proposed part 800 elaborate procedures for public participation go well beyond the provisions of NHPA. NHPA does not require separate public notice and comment requirements at every stage of the review process. Recommend that part 800 recognize Federal agencies' existing public participation procedures and permit agencies to rely on those procedures in addressing adverse effects only. The rule does not require separate public notice and comment requirements at each step. Also, the proposed rule already allows for use of agency procedures. Nevertheless, it is simply impractical and illogical to solely rely on agency procedures for public involvement regarding section 106 if such procedures fail to address historic preservation issues.

Public participation provisions are an improvement over the 1996 proposed rule, but still invite problems. Council is not vested with authority to regulate public participation. Section 106 does not address this topic. Council has no authority to vest anyone, but itself, with a reasonable opportunity to comment on the Federal undertaking. The Council believes it has the required authority to justify this and all other sections of the proposed rule. Please refer to our response regarding legal authority, below.

This provision lies outside of the NHPA section 106 authority, and is a back door mechanism to impose upon Federal agencies the Council's interpretation of the interested public instead of leaving the interpretation of that role to the agencies, in consultation with the Secretary of Interior as provided for in section 110(a)(2)(E) of the NHPA. Deleting this provision is recommended. The Council disagrees. As stated below, the Council has the required authority to justify this and all other sections of the proposed rule. Furthermore, § 800.2(d)(3) allows the use of agency procedures to the extent they provide pertinent information on historic preservation.

Section 800.3(a)

Several comments requested clarification that under § 800.3(a) the agency should not be considering case-specific issues, and that in this section the reference is to "type and nature" of the undertaking. In light of these comments and practical experience, the Council agreed that such a change was necessary. The language in § 800.3(a) was amended to state that the determination is as to whether the undertaking is a "type" of activity that has the potential to cause effects on historic properties, assuming such properties would be present.

Regulations should address what happens with program alternatives or PAs that were executed before the effective date of the new regulations. Such agreements are still valid and will continue to be in effect according to their terms.

Section 800.3(b)

The section should read that the Agency Official "may coordinate * * *." Council cannot require such coordination. The comment misreads the proposed rule. It only states that the Agency Official "should coordinate," implying encouragement, but not requirement.

Section 800.3(c)

30 day response period is too long and only ensures the destruction or damage to an archeological site where the project went forward because of the necessities of the mission. A 15 day response period would be much more appropriate in recognition of the rapid forms of communication available. The Council disagrees. The 30 day time period reflects an adequate balance between project need for expediency and workload requirements on reviewers.

Either delete section 3(c)(3) altogether, or add further guidance or regulatory definition of the phrase "* * * and to the nature of the undertaking and its effects on historic properties." Also, delete any discussion of timing in section 3(c)(4). It erroneously implies that nearly everything submitted to the SHPO falls under a 30 day review period. Review time periods should simply be referenced in the various sections of §§ 800.4-800.6. The rule indeed imposes a 30 day limit on SHPO/THPO at each step of the process where a formal response is required to findings and determinations, unless otherwise noted. See § 800.3(c)(4). SHPO/THPO cannot require the process to stop by failing to respond by the end of this period. On the other hand, there is no such clock for consultation alone (e.g., regarding APE or for seeking ways to avoid, minimize or mitigate adverse [*77704] effects). All that the Federal agency needs to do regarding such consultation is to make a reasonable effort to consult (which may or may not take 30 days) and move forward with the process.

Section 800.3(d)

Once SHPO declines to participate, Federal agencies should have no further burdens. To the extent that the Council is relying on SHPOs to comment or consult on its behalf under section 106, the agency complies with section 106 by providing SHPO (Council) an opportunity to comment. Rule should also contain presumption that SHPO concurs with a written finding if it does not respond within 30 days. Accordingly, § 800(d) should read: (1) If the SHPO declines in writing to participate, or otherwise cooperate, in the section 106 process, the Agency Official shall proceed as it believes appropriate; (2) If the SHPO does not respond within 30 days to a written finding under this part, or sooner if reasonably requested by the Agency Official, a presumption of concurrence with such finding shall be created. Federal agency obligations under section 106 of the NHPA do not terminate when the SHPO or any other entity declines to continue participating. SHPOs do not comment or participate in consultation on behalf of the Council. A process of allowing the agency to proceed without any Council review when SHPO declines to participate or respond within the 30 days is inconsistent with the letter, intent and spirit of the law. Nothing in the NHPA indicates in any way whatsoever that Federal agency responsibilities under section 106 disappear once a SHPO refuses to participate. The statute mandates Federal agencies to take into account the effects of their undertakings on historic properties and afford the Council a reasonable opportunity to comment regardless of what any other entity does or does not do. *16 U.S.C. 470f.* It is noted that the rule does have certain, reasonable presumptions of concurrence when a response does not come in time. See particularly, § 800.3(c)(4).

Section 800.3(f)

The regulations do not give adequate guidance regarding federally designated THPO's, Federally recognized tribes without a designated THPO, and federally recognized tribes not occupying tribal lands. Guidance is also needed to identify associated tribes, crosscutting boundaries or ancestral lands, differentiate among differing

views of ancestral lands to ensure that tribes' rights are addressed without impinging upon the property rights of private landowners. Such information can be provided in guidance but is not appropriate in a rule. Furthermore, see information above regarding Council/NPS project regarding assistance to Federal agencies regarding ancestral lands.

Section fails to establish who is responsible for establishing the list of consulting parties, setting a time limit in which the SHPO should respond, and defining what constitutes a good faith effort in doing so. This comment is incorrect. The proposed rule does establish that the Agency Official is ultimately responsible for establishing the list of consulting parties. It also sets forth the 30 day comment period. The meaning of a "good faith effort" will be better handled through guidance.

Section 800.4(a)

This is a useful and important provision. Minor wording changes are proposed to remove any suggestion that the SHPO is responsible for the decision: "(a) Determine scope of identification efforts. In consultation with the SHPO/THPO and other consulting parties, the Agency Official shall (1) Determine and document the area of potential effects, as defined in § 800.16(d); etc." The Council agreed with this recommended amendment since it clarifies that the ultimate decision here is made by the Agency Official. However, the phrase "and other consulting parties" was removed from the recommended language since the obligation to consult at this stage would not extend to other consulting parties.

Section on determining Area of Potential Effect fails to include time limit for a response by SHPO or other consulting parties to an agency's determination of APE. As stated above, the agency obligation is to consult. Failure by SHPO/THPO to respond to consultation within a reasonable time would allow agency to finalize its unilateral determination of the area of potential effect and move forward in the process.

Indian Tribes are given broad discretion to designate any property to which they attach religious and cultural significance, whether or not within tribal lands, as historic in the context of the consultation process. There are no standards directly relevant to the eligibility of such properties for the National Register. The broad discretion creates great uncertainty, delay, and costs. The rule should contain criteria on designating religiously or culturally significant properties. This comment is incorrect. These properties must be "historic properties" and therefore meet the National Register criteria. They must follow the same process as other potentially historic properties.

Requirement to consult with SHPO regarding the APE should be deleted. It needlessly extends the already protracted consultation process without any concomitant benefits. The Council believes that consultation with SHPO is valuable at this critical point to avoid later problems. Furthermore, consultation with the SHPO/THPO at this critical decision making point has always been viewed as an important part of the process. The Council decided to retain the duty to consult with the SHPO/THPO since the Council believes that SHPO/THPOs have special expertise as to the historic areas in their jurisdiction and the idiosyncracies of such areas, and can greatly assist the Agency Official, using such expertise, in determining an accurate area of potential effects. Nevertheless, it is noted that the Federal agency is ultimately responsible for making the final determination about the area of potential effect (***i.e.,*** the concurrence of the SHPO/THPO in such determination is not required).

In the case of scattered site housing rehabilitation program, the Agency Official should have the authority to determine that (1) the area of potential effect is limited to the property to be rehabilitated, and (2) any structure to be rehabilitated that is less than 50 years old is not considered eligible. The result would allow scattered site housing rehabilitation to proceed in a responsible manner without adding a time-consuming consultation process with no apparent benefit to the public or environment. The Council disagrees. Not all scattered site projects are the same. Where a block of properties are to be rehabilitated, the historic district may be affected. The less than 50 years old exemption should be handled during negotiation of a Programmatic Agreement.

Given that some of the tribes with ancestral interest in a project area are no longer physically located within the state, it is difficult or unfeasible to comply with this provision. The reg needs to set some practical limits on consulting with Tribes in identifying historic properties. The NHPA does not set such limits on consultation. The location of tribes and the boundaries of tribal lands are consequences of history to which tribes were subjected. Accordingly, the fact that a tribe may not live on or near a significant property should not be an impediment to its participation in consultation. As stated above, this is the subject of a guidance [*77705] project currently under way between the Council and the National Park Service.

The regulations should set forth a process to follow when the SHPO disagrees with an agency determination of the area of potential effects (APE)-similar to the process for determinations of eligibility. Also, we need further guidance on what is considered "documenting" the APE. The Council believes the process in the rule regarding APE should remain unchanged. The determination of APE should be ultimately done by the Federal agency in consultation with the SHPO. SHPO can seek informal advice from the Council. Guidance could be developed regarding what is considered "documenting" the APE.

Section 800.4(b)

Comments recommended that the provisions of section 106 be extended only to properties formally determined eligible, and that this section should therefore be deleted. The Council disagrees. Both the Council and the Department of the Interior have interpreted the NHPA to require section 106 consideration of all properties that are listed on the Register, as well as all those that meet the criteria of eligibility on the National Register, regardless of whether a formal determination by the Keeper has been made. Well established Department of the Interior regulations regarding formal determinations of eligibility specifically acknowledge the appropriateness of section 106 consideration of properties that Federal agencies and SHPOs determine meet the National Register criteria. See *36 CFR 63.3*. The NHPA specifically defines "historic properties" as those that are "included in, or eligible for inclusion on the National Register." *16 U.S.C. 470W*(5). Not only does the statute allow this interpretation, but it is the only interpretation that reflects (1) the reality that not every single acre of land in this country has been surveyed for historic properties, and (2) the NHPA's intent to consider all properties of historic significance. It has been estimated that of the approximately 700 million acres under the jurisdiction or control of Federal agencies, more than 85 percent of these lands have not yet been investigated for historic properties. Even in investigated areas, more than half of identified properties have not been evaluated against the criteria of the National Register of Historic Places. These estimates represent only a part of the historic properties in the United States since the section 106 process affects properties both on Federal and non-Federal land. Finally, the fact that a property has never been considered by the Keeper neither diminishes its importance nor signifies that it lacks the characteristics that would qualify it for the National Register.

Rule should clarify that the section 106 process does not impose identification burdens upon the private applicant. Although identification obligations are placed on Federal agencies, in reality the burden is often passed on to the applicant through delays or conditioning the agency's decision until the applicant has funded the identification efforts. Federal agency ability to shift burden to applicant is dependent on that agency's independent authority. The section 106 rule does not confer such authority nor relieve Federal agencies of its duties. This may be an appropriate guidance topic to be developed.

Regulations fail to respect the National Register nomination and listing process and grant unbridled authority to impose section 106 requirements on properties already deemed ineligible. Properties that are determined ineligible are not subject to section 106 consideration. Revisiting eligibility determinations is encouraged on certain occasions, but not mandatory.

Any imputation of a new substantive duty under section 106 to discover unidentified properties is negated by the detailed provisions for the discovery of unknown properties contained elsewhere in NHPA. The Council disagrees. The obligation to identify during planning is different than coming across something during construction. Further obligation is limited in scope, duration and intensity. The "discovery" provisions of the NHPA do impose a continuing duty to survey and identify historic properties. See *16 U.S.C. 470h-2*(2)(A). However, the reality is that such an effort has not reached every acre of land of this country that could be affected by a Federal undertaking, and the NHPA seeks to protect historic properties even if they had not been identified prior to the proposition of an undertaking. This is clearly reflected in the statute where it provides, for example, that agency procedures implementing the Council's section 106 rule would provide a process for identifying historic properties. *16 U.S.C. 470h-2*(a)(2)(E)(ii). The NHPA would not contain this language if it believed the other, general surveying provisions were sufficient.

Since SHPOs are statutorily required to conduct comprehensive statewide surveys of historic properties (section 101(b)(3) of NHPA), Federal agencies and permit applicants should not have to be required to engage in field investigations or surveys. SHPOs should already know what historic properties exist. No. Agency obligation to "take into account" effects on historic properties necessarily places an affirmative duty to identify historic properties. The Council notes that the rule does not compel shifting of such agency burden to applicants. Also, please refer to the immediately preceding response.

Although proposed rule on its face may place identification efforts on Federal agencies, the reality is that these burdens are borne by applicants. This is usually done by delaying or conditioning the Federal decision until the applicant has funded the identification effort requested by the SHPO or Council. This tactic is improper and the rule should clarify that the process does not impose the burden upon applicants through either direct or indirect means, including delays. The rule does not compel shifting of this or other Federal agency burdens to applicants. Section 106 obligations lie with the Federal agency. Although Federal agencies may be requiring submissions, as a basis of accepting applications, this is not compelled by the rule.

Council only has authority to promulgate rules regarding section 106. Since section 106 does not address the identification of historic properties or evaluation of historic significance, the Council has no authority to regulate these activities. The duty to identify historic properties are placed upon Federal agencies, the Secretary of the Interior, and SHPOs under other sections of the NHPA (namely sections 101 and 110). The Council disagrees. The NHPA grants the Council the authority to promulgate regulations regarding section 106 "in its entirety." *16 U.S.C. 470s.* It would be impossible for an agency to take into account the effects of its undertakings on historic properties (which include those listed on the Register, as well as those eligible for listing), as section 106 requires, if it does not know what those historic properties are in the first place. Accordingly, the identification and evaluation provisions of this rule are reasonable under the authority. Also, see response to comment above regarding ongoing identification duties.

This provision for phased identification and evaluation using an MOA is inconsistent with our prior understanding that an MOA should be used exclusively to stipulate mitigation measures for properties that have been identified and fully evaluated. With this change, why would an agency do a project specific PA? Phased identification acknowledges the reality [*77706] of large projects. A programmatic agreement may be an alternative, but this provision expands the flexibility of the rule.

Section 800.4(c)

This section should be revised to overcome the current perception that agencies are required to identify every single specific property that may be affected and study each sufficiently to apply the National Register criteria. This drives up the cost of S. 106 consultation, unnecessarily delays the process, discourages consideration of indirect and cumulative effects, and complicates coordination with NEPA. The provision for phased ID and evaluation helps, but § 800.4(a) should be revised to make it clear that it is permissible to address eligibility prospectively, and to focus on "types of properties" rather than to identify every single property. The phased identification provisions of the rule are intended to deal with this issue. The Council intends to provide guidance regarding phasing.

Section 800.4(c)(1) is misleading in stating that tribes have "special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them." Their expertise is not in applying the criteria of eligibility, it is in identifying some kinds of historic properties and in identifying effects that might not be apparent to others. The current wording sets up the tribes to overrule decisions made by agencies and SHPOs. The Council clarifies that tribal expertise is not in applying the eligibility criteria per se, but in bringing a special perspective to how a property possesses religious and cultural significance. This reflects the fact that such Tribes are particularly well placed to provide insights and information on those properties of religious and cultural significance to them. It is common sense to reach out to the Tribes regarding these issues.

Requiring eligibility determination from the Keeper when SHPO disagrees with Agency Official determination gives SHPO a veto over the project. The Keeper eligibility process is so lengthy that applicants have no alternative but to go along with the SHPO's position regarding time-sensitive projects. SHPO can delay projects simply by claiming not to have sufficient information. Department of the Interior regulations require a response from the Keeper within 45 days. Those regulations also recognize the concurrent Agency/SHPO determination scheme. See 36 CFR part 63. The section 106 rule does not encourage wrongful delays by any party. Cases where an abuse of the process is suspected can always be brought to the attention of the Federal agency conducting the review and/or the Council.

Proposed rule gives Tribes the de facto ability to designate any property to which they attach religious and cultural significance as a historic property. Tribes can then pressure the Agency Official to take their concerns into account above all others. Proposed rule effectively requires Federal agencies to defer to Indian tribes on what properties are reached by section 106, and give added (if not dispositive) weight to religious considerations in that determination. The Council disagrees. Properties of religious and cultural significance to Tribes must meet the

National Register criteria in order to be considered "historic" and subject to section 106 consideration. The fact that a Tribe attaches religious and cultural significance to them does not make them "historic," but neither does it preclude them from meeting the National Register criteria. The Federal agency makes the determination of eligibility, and disputes are ultimately resolved by the Keeper based on the secular National Register criteria. The Tribe is consulted but, again, the ultimate decision in the case of a dispute with the Federal agency finding by a SHPO/THPO, is the Keeper.

The NHPA does not empower the Council to require Agency Officials to obtain a determination of eligibility from the Keeper. In fact the NHPA prohibits "any person or local government" from providing a nomination for inclusion of a property on the Register unless such property is located within a State where there is no SHPO. Moreover, this is redundant with 36 CFR part 63. There is no basis for requiring SHPO concurrence or agreement. Finally, the NHPA expressly prohibits the nomination of any historic property for the Register where the owner objects. *16 U.S.C. 470*(a)(6). Such prohibition should be integrated into the proposed rule to reflect that when such objection is lodged with a Federal agency, they may terminate their section 106 review. The comment fails to realize that a determination of eligibility is not the same as a nomination/listing on the National Register. The Council also points out that under the NHPA, an owner's objection to a nomination/listing still can lead to the Secretary of the Interior determining the eligibility of the property. It should also be noted that this rule provides that an owner of an affected property can, and should be, invited as an additional consulting party in the section 106 process. See § 800.2(c)(6) of the rule. Finally, see responses above to the issue of Agency/SHPO concurrence determinations of eligibility.

Various comments comment suggested that in the last sentence, the word "special" should be changed to "unique." The Council disagreed. The word "unique" excludes everyone else and gives the incorrect impression that Tribes have the final word that cannot really be challenged by the Agency. Also, see response above regarding the need of properties of "religious and cultural significance" to Tribes to meet National Register criteria in order to be considered "historic."

Section 800.4(d)

The addition of a 30 day waiting period, even when no historic properties are identified, is unreasonable. Suggest that the waiting period after submission to SHPO/THPO be eliminated consistent with previous regulations. The Council disagreed. This period is necessary so the consulting parties and the Council can review the finding responsibly and object if appropriate. Such review also allows mistakes to be caught in time before they potentially lead to costly litigation.

Move this subsection under § 800.5 and re-title § 800.5 to "Assessment of Effects." The proposed change was rejected since these are outcomes of identification and effect assessments. However, the Council may draft guidance on the topic of assessment of effects.

Section 800.5(a)

A tribal comment stated that the exemption of properties of religious and cultural significance from the demolition by neglect provision (§ 800.5(a)(2)(vi)) is so broadly written that it could lead to the loss of National Register districts in pueblos and other Native communities. This provision had been added at the request of Indian tribes. It specifies that the exception only applies where neglect and deterioration are recognized qualities of the property. A further safety valve is that a "no adverse effect" determination is subjected to review by consulting parties (which would include Tribes that attach religious and cultural significance to the historic property at issue). See § 800.5(c). Lastly, the Council is not aware of this provision having been applied inappropriately or over the objections of Tribes.

Criteria of adverse effect too broad, and encompasses activities of benefit to the public. Accordingly, such activities [*77707] **are delayed. Examples of such activities are: reclamation of abandoned mines, creation of wetlands, "hazardous material remediation" (§ 800.5(a)(2)(ii)), rehabilitation of historic properties, and provision of handicapped access.** Adverse effect criteria are linked specifically to objective National Register criteria published by the National Park Service, which are used to determine characteristics that contribute to a property's historic significance. If those characteristics are adversely affected, then the historic significance is impaired. It is noted that program alternatives under § 800.14 are intended to deal with repetitive or minimal impact situations. Finally, while the listed activities may be of benefit to the public, it does not necessarily follow that such positive activities could not also cause

an adverse effect on historic properties. Again, all that the section 106 process requires is that such effects be taken into account. The section 106 process does not prohibit any projects, beneficial or otherwise.

Proposed rule uses impermissibly vague and overbroad terms, in violation of the Due Process Clause. Its definition of "adverse effects" includes those when an undertaking "may" alter "indirectly" "any" of the characteristics making the property eligible in a way that would diminish the integrity of the property's "feeling" or "association." Such definition does not give fair notice as to what it requires, and is not grounded on intelligible principles. This further complicates, expands, and lengthens the process, adding difficulties, costs and uncertainty. As stated above, adverse effect criteria are linked specifically to objective National Register criteria published by the National Park Service. The National Register criteria itself expands on the meaning of its terms and provides various examples. These criteria have been fleshed out through consideration and application countless times, over the years, since the program began, and explained through various guidance documents. For example, see National Register Bulletin 15, "How to Apply the National Register Criteria for Evaluation," which includes definitions of the terms "feeling" and "association."

Criteria of adverse effect should exclude "insignificant" transfers of property. De minimis transfers of property are being subjected to lengthy section 106 process. The rule provides for an avenue, under § 800.14(c), whereby the appropriate agency can pursue an exemption.

The criteria of Adverse Effect is devoid of any limitations on the proximity of an undertaking to a historic site, allowing the SHPO to be inconsistent and subjective when evaluating effects. The standard set forth under section 106 is effect, not proximity. While it is possible that distance separating an undertaking from a particular historic property may remove any effects, such a determination should be made on a case by case basis, and is not suitable for a generalization. Different undertakings simply have different areas of potential effects according to several factors such as the nature of the undertaking itself, the nature of the historic property at issue and topography.

The current and proposed rule do not take into account the fact the cumulative impact of adding a monopole to areas with modern intrusions would not be an adverse effect. The proposed rules, therefore, will lead to consultative gridlock as the expansion of wireless services continues. This and several other issues mentioned by the telecommunications industry in this rulemaking process have been or are in the process of being addressed through ongoing discussions with the industry, the FCC and SHPOs. These discussions commenced before the present rulemaking process. Such ongoing discussions are referred hereinafter as "Telecommunications Working Group."

Section 800.5(b)

Final decision regarding adverse effects is charged on the Agency Official. Council has no authority to impose its determination on this matter. Council may comment on the issue, but the final decision is to be made by the Agency Official. The Council has used its expertise in setting up the criteria of adverse effects on this rule. It therefore has a justifiable role and the expertise in ensuring the correct interpretation of its rule. Section 800.7 of the rule is clear in stating that the Agency Official can terminate consultation on ways to avoid, minimize or mitigate adverse effects, and request Council comments. The Agency Official can then proceed with its undertaking in any way it wants, after taking the Council's expert comments into account.

There is no basis for mandating consultation regarding adverse effects. To the extent that other sections of the NHPA require Agency Official consultation with the SHPO, these provisions are not to be implemented by section 106 regulations of the Council. The Council believes this consultation is reasonable and necessary in that it provides the Federal agency with the information and considerations needed for it to take into account the effects of its undertakings on historic properties. Consulting parties are defined in such a way as to ensure they have the necessary interest and competence in informing Federal agency decisions on historic properties. As elsewhere in the process, consultation ensures that correct and informed decisions are made and that mistakes are not overlooked. See response regarding legal authority, below.

To address agreements like Community Development Block Grant (CDBG) Programmatic Agreements, the Council should add language which recognizes situations where the specific details of future activities are unknown and the consulting parties agree that adverse effects will be avoided through review and standard mitigation measures. Such language can, and many times is, used and provided for in the Programmatic Agreements themselves. There is no need to add this language to the process under the rule to reach such agreements. As stated before, the Council has revised the rule to provide for prototype agreements, which could be particularly helpful in the CDBG context.

Section 800.5(c)

Proposed rule gives Tribes power to require further analysis (and therefore delay) under the process whenever they attach religious or cultural significance to a property. Tribes are provided the same consultative opportunities to review an agency's findings that other consulting parties are provided. The rule only encourages, but clearly does not require, the agency to reach such concurrence. See response above to comments regarding properties of "cultural and religious significance." Also see section 101(d)(6)(B) of the NHPA.

Subsection (c)(1) is directly contrary to NHPA since NHPA only requires documentation when an adverse effect is found. *16 U.S.C. 470*(l). This comment misreads the statute. Section 110(l) of the NHPA simply indicates that when no solution to adverse effects is reached and embodied in an agreement in accordance with this rule, the Federal agency must document its decision after considering Council comment. This is completely different than providing the documentation necessary for reviewers to understand agency decisions in the normal section 106 process, which is reasonable and not precluded by anything in the statute. [*77708]

Subsection (c)(2) must clarify that a finding of adverse effect does not require consultation under section 106. The Council is provided a reasonable opportunity to comment under section 106. The Council disagrees. Section 110(l) of the NHPA explicitly indicates its blessing of the Memorandum of Agreement consultation concept when it states that when no such solution is reached in accordance with this rule, then the agency head must document its decision after considering Council comment. Furthermore, the rule clearly states that once a Federal agency has entered into such consultation, it can terminate and proceed to Council comment.

Regarding § 800.5(c)(2)(i), anytime a consulting party objects to a finding, the Federal agency should notify all consulting parties and consult again with all parties prior to seeking consultation with the Council. Regarding 5(c)(3), the Council should also notify all consulting parties of its determination. Regarding the § 800.5(c)(2)(i) point, the Council clarifies that if consultation with the objecting party leads to changes affecting other parties, the Agency should go back to them. The Council also notes that it would notify all consulting parties regarding its § 800.5(c)(3) determination.

Section 800.6(a)

The regulations grant an unconstrained authority to require mitigation to avoid adverse effects with no constraints on cost and without requiring any nexus between the mitigation and actual adverse effect. Comment is incorrect. The agency can, based on the applicant's position, refuse any mitigation measures and terminate consultation. Furthermore, the rule is quite clear in that the consultation that may lead to an agreement is to avoid, minimize or mitigate the adverse effects on the historic properties.

Rules should provide that any Adverse Effect comment should include recommendations and core criteria for mitigation to reduce the effects to No Adverse Effect. While this is permissible, the Council believed the rule should not require it as a duty of SHPO/THPO at the determination of adverse effect step. Review at that point is intended to focus on identifying whether adverse effects exist, and not to provide a full range of mitigation options.

Section 800.6(b)

Proposed rule inappropriately attempts to require parties to sign an MOA to avoid additional delays from Council comment on the undertaking. Federal Register Council has no authority to require execution of a binding contractual agreement of any kind. Section 110(l) does not mean that the Council may compel the use of MOAs. This is beyond Council authority and must be deleted from the rule. The rule does not require or compel execution of an MOA. Furthermore, section 110(l) of the NHPA explicitly indicates its endorsement of the Memorandum of Agreement (MOA) consultation concept when it states that (1) when no such solution is reached in accordance with this rule, then the agency head must document its decision after considering Council comment, and (2) when such an agreement is reached, it shall govern the undertaking and all its parts.

There is no specific time period for Council review of a MOA when Council is participating in consultation which can significantly lengthen the section 106 compliance process. Regulatory time limits or guidelines (30-45 days) should be promulgated. Similarly, there is no review time specified for Council response to the submission of an executed MOA. Recommend time limit or guidelines of 30 days. The Council consults regarding MOAs but does not "review" them. The Council does not review executed MOAs, so there are no delays of agency action.

Section 800.6(c)

Several comments requested changes to the rule to clarify the issue of invited signatories. The Council agreed that this section needed to be changed. The changes to the rule indicate that the Agency Official is the one that ultimately decides who is an invited signatory, and that the rights to seek amendment or termination of an MOA attach to those that actually sign the MOA.

A comment regarding *36 CFR 800.6(c)(2)(I)* supported retention of the permissive "may" in allowing agency to invite an Indian Tribe or Native Hawaiian organization to become a signatory to a MOA, but would find a language such as "should" or "shall" to be unacceptable. Several tribal comments, on the other hand, requested that the tribes be given a signatory right. This was a major issue during the development of the 1999 rule. After careful consideration, the Administration made a policy decision that is reflected in the proposed rule. Indian tribes are not mandatory signatories to an MOA dealing with effects on historic properties off tribal lands. The Council has no new evidence to support changing that position.

SHPOs are given broad discretion to determine appropriate mitigation for an MOA, resulting in the process being unregulated. This comment is incorrect. The Federal agency has the discretion to agree or disagree with SHPO/THPO views regarding an MOA. When an agreement is not reached, the agency goes for Council comment to wrap up the process.

Section 800.7(c)

There is no authority for the Council to dictate to Federal agencies how they consider Council comments, how they document or prepare records of decisions, nor how or whether they notify the public, nor require the agency to provide the Council with the decision prior to approving the undertaking. The NHPA specifically grants the Council the authority to promulgate rules to implement section 106 in its entirety. Section 106 requires Federal agencies to give the Council a reasonable opportunity to comment. Section 110(l) of the NHPA explicitly requires the Federal agency to document its decision made pursuant to section 106. The Council is well within its authority to implement these requirements and determine how such opportunity is provided the Council, and how the required documentation is provided.

Time for Council comment should be limited to 30 days, and the Agency Official could decide to grant an extension if it so desired. The Council believes the 45 day comment period is reasonable, takes into account the reality of staff and Council workload and need for adequate consideration, and reflects a shorter time period than previous rules (the section 106 rule adopted in 1986 set a 60 day period).

Section 800.8(a)

Rule contravenes NEPA by seeking to require processing under NEPA of undertakings that have no significant or no adverse impact on historic properties. The Council emphasizes that the rule clearly does not require NEPA processing for anything. That is something the Federal agency must decide independently.

Rule contravenes NEPA in that it undermines the categorical exclusion provisions of NEPA by requiring section 106 processing for all categorically excluded Federal actions and failing to provide a compatible process for excluding from section 106 those actions that have small or insignificant impacts, thus causing waste of enormous public and private compliance resources struggling with the least measurable and least [*77709] **important Federal actions.** The statement is incorrect. Section 106 of the NHPA covers "undertakings" regardless of NEPA categorical exclusions. The NHPA and NEPA are independent statutes with separate obligations for Federal agencies. Furthermore, § 800.14(c) provides for a way that agencies can request and obtain exemptions.

Section 800.8(c)

Comments suggested need for guidance to facilitate use of provisions allowing substitution of NEPA for section 106 process. The Council is committed to develop such guidance and assist Federal agencies that desire to follow these provisions of the rule.

Any integration of the NEPA process with section 106 should allow EAs as well as EISs to constitute full compliance with section 106. Section 800.8(c) of the rule allows just that when certain reasonable standards are met. Those standards ensure that historic properties are taken into account in a manner consistent with the NHPA.

Council has no authority to prescribe rules regulating Federal agencies' use of NEPA to comply with section 106. Such an approach was rejected during the 1992 amendments. The Council notes that the NEPA coordination provisions of this rule only apply when the Federal agency independently chooses NEPA documents/process to substitute for the regular section 106 process that they would have had to follow otherwise. The Council has the authority to set conditions for an agency to substitute another process for the Council's government-wide rule.

Requirement that the NEPA documents include mitigation measures should be deleted. The Supreme Court has stated repeatedly that NEPA mandates that mitigation measures be discussed, but that there is no requirement that a detailed mitigation plan be adopted. The Council has no authority to attach such a requirement to the NEPA process. Again, the NEPA/106 substitution provisions of this rule apply only when the NEPA process is used to substitute regular section 106 process that the Federal agency would have had to follow otherwise. Nothing in the rule requires adoption of mitigation measures since the option of getting formal Council comments instead is still available.

Section 800.9(a)

It is not the responsibility of the Council to decide whether or not their procedures have been followed regarding Agency determinations. The only Council right is to expect a reasonable opportunity to comment and that its comments will be considered before the agency proceeds with the undertaking. The rule makes it clear that this is not a binding "decision" by the Council, but an advisory opinion (see section 202 of the NHPA). The Council, as the agency promulgating the section 106 rule, has the specific expertise and interest in opining as to whether its rule has been correctly followed.

Section 800.9(b)

The process in § 800.9(b) regarding the Council's determination of a foreclosure lies outside of the Council's authority. A finding of foreclosure is an advisory opinion within the Council's authority (see Section 202 of the NHPA). The Council, as the agency promulgating the section 106 rule, has the specific expertise and interest in opining as to whether its rule has been correctly followed.

Section 800.9(c)

Comments questioned the statutory authority for Council to promulgate regulations implementing section 110(k) of the NHPA. Section 211 of the NHPA authorizes the Council to promulgate regulations to implement section 106 in its entirety. Section 110(k) directly relates to the section 106 and what an agency must do when an applicant's actions may have precluded section 106 review. Moreover, section 110(k) specifies a requirement that the Council be consulted. The rule simply re-states Section 110(k), sets forth how the Council will be consulted, and reminds agencies of their further section 106 responsibilities.

Section 800.9(d)

Council's assertion, under § 800.9(d)(2), that it can participate in individual case reviews, however it deems appropriate, finds no support in any section of the NHPA and should be deleted. The Council changed the rule in response to this comment. The change expressly limits the role of the Council in such reviews to accord with the role already given to the Council under subpart B and parallel to that of SHPO/THPOs.

Section 800.10

A comment questioned the statutory authority for Council to promulgate regulations implementing Section 110 of the NHPA. Section 211 of the NHPA authorizes the Council to promulgate regulations to implement section 106 in its entirety. The Council notes that undertakings affecting National Historical Landmarks (NHLs) are subject to section 106 review. NHLs are "historic properties" listed on the National Register. The provisions of § 800.10 lay out how the Council may participate in the section 106 review of these particularly important historic properties, how the Council may request a report from the Secretary of the Interior pursuant to section 213 of the NHPA, and how the Council will provide a report to the Secretary on the outcome of the consultation.

Section 800.11(a)

NHPA section 470k limits the substance and extent of any documentation requirement dependent upon each Federal agency's authority and funding; therefore the proposed § 800.11 should be revised to clarify that the rules' documentation requirements are not mandatory but are recommended guidelines consistent with NHPA 470k and the Council's advisory role. To better comport with statutory language, § 800.11 was changed by adding language that clarifies that documentation requirements are mandatory but limited "to the extent permitted by law and within available funds." *16 U.S.C. 470k.* The documentation provisions remain mandatory since the Council and other reviewers simply cannot comment without a basis, which can only be provided by adequate documents. The Council believes that the document requirements are not only minimal, but should be readily available to any agency as its record supporting its decisions in the process.

When a documentation dispute is presented to the Council, it must be resolved in a timely manner. When documentation disputes are referred to the Council, the Council is committed to expeditiously providing a resolution to them. The resolution provided by the Council will include guidance as to when the relevant party should complete their review of the finding or determination at issue-taking into account how long the party disputing the documentation has had the documentation, particularly in cases where such documentation is deemed by the Council to have been adequate.

Documentation standards are extremely broad, and likely to create confusion. Specific standards should be included that reference and adopt, at a minimum, documentation sufficient to satisfy the definition of "sacred site" in EO 13007 ("any specific, discrete, narrowly delineated location on Federal land that is identified by" an authoritative Indian tribal source). Documentation standards are [*77710] adequately specific and far more specific than those of past regulations. The matter about defining "sacred sites" is better handled through guidance. Nevertheless, the Council clarifies once more that sites, sacred or otherwise, must meet the National Register criteria in order to be considered in the section 106 process.

Questions statutory authority for Council to impose extensive documentation requirements. Section 110(l) of the NHPA requires agencies to document their section 106 decisions, but does not authorize Council to elaborate. Section 203 of the NHPA authorizes the Council to obtain information from Federal agencies, but does not require those agencies to provide the information. Section 203 of the NHPA would be meaningless if it authorized the Council to obtain documents from Federal agencies, but did not require such agencies to comply according to the law. Furthermore, the Council is within its statutory authority to promulgate regulations implementing section 106 in its entirety, in setting the rule's reasonable documentation requirements. Documenting decisions not only assures meaningful compliance with the requirement to take into account effects to historic properties, but it produces the necessary information for consulting parties to assist the Federal agency in meeting its duties. Furthermore, the Council would not have a reasonable opportunity to comment on an undertaking without having adequate documentation on the undertaking and relevant historic properties, as provided in this section of the rule.

Section 800.11(c)

It is too cumbersome for the agency to be required to consult the Secretary of the Interior and the Council every time it wishes to withhold information under this provision. This consultative process is set forth and mandated by section 304 of the NHPA. The rule simply outlines a reasonable process for the Council participation required by section 304.

Regarding § 800.11(c)(2), the Agency official should also submit to Council the views of SHPO regarding the confidentiality of information. The Council agreed and changed the rule to reflect this. SHPOs views as to confidentiality and harm to resources are relevant, and confidentiality is not limited to tribal issues.

Section 800.11(d)

Documentation level for a finding of no Historic Properties Affected is unreasonable. The Council believes the level of documentation is more than reasonable, if not minimal, since the agency should already have the listed documentation readily on hand in order to have been able to reach such a decision.

Section 800.11(e)

Section 800.11(e)(5) should require that each criteria of adverse effect be explained, whether found applicable or inapplicable, to ensure consistency in agency documentation. The Council disagreed with this proposal. Many

criteria may have no relevance whatsoever to a particular project. Nevertheless, the Council believes some guidance may be warranted in the future to promote consistency in agency documentation.

Section 800.12(a)

It is not clear how the regulations apply during rehabilitation work, monitoring the emergency from a cultural resources perspective, or when to implement the regulations during emergency situations. The Council believes the rules are clear that the emergency provisions are triggered when an agency proposes an emergency undertaking in response to a declared disaster. The provisions require notification and a seven day review period.

Section 800.12(d)

Implementation time for emergency procedures should be extended from 30 days for a formally declared event to 90 days in order to allow for limited agency resources to adequately address all the issues that arise from a disaster related event. The longer an implementation time is extended, the lesser the justification for emergency, abbreviated procedures. Furthermore, the rule already allows requests for extensions of time when needed. The Council has not declined any such extension requests.

Section 800.13(b)

Agencies often do not often want to assume a new find to be National Register eligible. To address this, the comment offered a proposed change. The Council believed the suggested concept was useful and incorporated changes to the rule. The changes state that the subject of eligibility can be raised (and be considered by agency) in comments. As explained above, section 106 applies to those properties listed or eligible for listing on the National Register. This change acknowledges the importance of National Register eligibility at this point.

Section 800.13(b)(2) should be removed for the same reason that the data recovery exemption was removed from the 86 regulations. The Council disagreed. A short cut for these post-review discoveries of archaeological resources of value only for their data is necessary. The Council believes that tribal involvement will provide an adequate safeguard.

Section 800.14

The program alternative provisions are too rigid, intimidating and difficult to apply and create a one-size-fits all approach. The revised regulations should make this provision more useful so that it can be applied more productively to Federal agencies and industry. What the alternatives under § 800.14 do is to provide vehicles to tailor the section 106 process to the particular needs of each agency, agency program or group of undertakings. While the intent is to provide such flexibility in the final product, it is still essential to maintain the role of the public, preservation officers and other stakeholders in providing necessary input in shaping those products.

Section 800.14(a)

Include a provision for Council monitoring and evaluation of whether Federal agency program alternatives are working or not. Council monitoring of program alternatives should be on a regular basis, including, but not limited to, how agencies implement the "exempted categories" projects. Also, add a provision for the Council to publish a list of acceptable Federal Agency alternative programs and make them available to the public. Monitoring measures would be included, as appropriate, in the alternatives' agreements themselves. Regarding a list of Council approved alternatives, the Council does not need a change to its rule to publish such a list.

Since agency must submit any proposed alternate procedures for review by Council and NCSHPO, requirement for publication in the Federal Register should be eliminated. The Council disagrees. **Federal Register** notice of final adoption of these alternatives is needed to notify the public as to these changes in how Federal agencies comply with section 106.

Regarding all of § 800.14, the Council is granted no rights under the NHPA to be consulted with about Federal agency development of their procedures. Section 110(a)(2) requires consultation with the Secretary of the Interior, but not with the Council. Federal agencies [*77711] **may find consultation with the Council desirable, but it is not required by the statute.** The comment simply misreads section 110(a)(2) of the NHPA. That section deals with non-binding procedures that agencies may use to implement the Council's binding, section 106 regulations under

36 CFR part 800. The alternatives under section 800.14 directly modify or substitute for the Council's binding regulations regarding certain programs or undertakings, and therefore require our direct involvement. The Council believes it has the internal experience and expertise to make such evaluations. Also, the diversity of its membership ensures that a balanced perspective is brought to final determinations regarding consistency. Section 211 of the NHPA states that the Council "is authorized to promulgate such rules and regulations as it deems necessary to govern implementation of section 106 * * * in its entirety." Section 110(a)(2) of the NHPA states that the "(Federal agency historic preservation) *program[s]* shall ensure * * * that the agency's procedures for compliance with section 106 * * * are consistent with regulations issued by the Council * * *" (emphasis added). It must be understood, among other things and upon closer examination, that section 110 of the NHPA does not specifically provide for Federal agencies to substitute their programs for the section 106 regulations promulgated by the Council. Through § 800.14 of the rule, the Council is allowing for such substitution, believing this may help agencies in their section 106 compliance. However, the Council will not allow such substitution if the agency procedures are inconsistent with the Council's 106 regulations. The Council, in its expertise, holds that its regulations correctly implement section 106, and that it would therefore be inimical to its mandate and contrary to the spirit and letter of section 100(a)(2)(E) of the NHPA, for the Council to allow inconsistent procedures to substitute the Council's section 106 regulations.

The Council should seek the views of affected SHPOs and notify them of final adoption when an Indian tribe enters into an agreement with the Council to substitute tribal regulations for Council regs. The Council notes that section 101(d)(5) of NHPA already requires such consultation with the affected SHPO, and that the Council would obviously notify such affected SHPO as to a final substitution.

Section 800.14(b)

These regulations require more steps, more paperwork, and therefore more time to process routine CDBG Programmatic Agreements. Under the new regulations, the Council must participate more actively in these highly routine and repetitive agreements; and the Council treats the activities covered by CDBG agreements as "adverse effects." We request Council reconsider its procedures for routine PAs. In response to this comment, the Council agreed to provide a new procedure for routine Programmatic Agreements. See § 800.14(b)(4).

It is not clear that Programmatic Agreements under § 800.14(b)(3) are developed by an agency official in consultation with the SHPO. Additional guidance is needed beyond simply referencing § 800.6. The Council notes that the SHPO and other consulting parties must be consulted, just as they would be consulted for a Memorandum of Agreement under § 800.6.

Section 800.14(c)

The Council should modify the proposed rule to accommodate and promote voluntary habitat conservation efforts under the ESA. It should establish as an "exempted category", exempting from section 106 review, all voluntary incidental take and enhancement of survival permits issued by either FWS or NMFS under section 10 of the ESA. Also, approval of and voluntary participation in a "take limitation" or exemption created under a special conservation rule adopted by either the FWS or NMFS under section 4(d) of the ESA should also be exempted from NHPA review. These and other specific alternatives and exemptions recommended by the commenting public should be decided after the appropriate § 800.14 process is followed, and not through the rulemaking itself. The Council encourages Federal agencies to submit proposed exemptions and other alternatives.

Under § 800.14(c)(5), the Agency Official should submit the views of SHPO/THPO to the Council along with the other required documentation. The Council should also notify SHPO/THPO of the Council decision. In § 800.14(c)(7), SHPO's and others should be able to request that the Council review an Agency's activities to determine if the exemption no longer meets the criteria. The Council decided to change this section to explicitly add SHPO/THPO comments to those that need to be submitted. The Council assures the commenting public that it will notify SHPO/THPOs of final decisions regarding exemption decisions. Finally, the Council notes that anyone can request the Council to conduct a review of a program alternative without need of amendment to the rule.

Section 800.14(f)

Requiring comment from all Indian tribes is unnecessarily broad. Section 800.14(f)(1) should be amended so as to provide an appropriate government-to-government consultation with affected Indian tribes and consultation with Native Hawaiian organizations when a nationwide Programmatic Agreement is being developed, add-

ing language to the effect that "when a proposed program alternative has nationwide applicability, the Agency Official shall identify an appropriate government-to-government consultation with Indian tribes and consultation with Native Hawaiian organizations." The Council agreed with the concept and rationale of the proposed change. It therefore added language to § 800.14(f) regarding tribal consultation for nationwide agreements, while honoring the underlying intent of meaningful consultation with Indian tribes and Native Hawaiian organizations.

Section 800.16(d)

Rule is unclear, and allows area of potential effect for a one acre wetland permit, to encompass entire development site (which could be over one hundred acres). The area of potential effects should be the one acre of wetland. Vagueness of rule leaves applicants vulnerable to high costs and long permit delays. The issue of area of potential effects and wetlands permits is one that needs to be worked out between the Council and thepplrps of Engineers. The Council notes that section 106 requires Federal agencies to take into account the effects of undertakings on historic properties. An undertaking is defined by the statute to include a " *project* (or) activity * * * requiring a Federal permit, license or approval." The effects to be considered are those of the "project" that required the permit. Moreover, in most instances the effects of projects are felt by historic properties beyond the immediate footprint of a project. To illustrate, a historic property whose integrity would be affected by increased noise is affected even though it is not itself located on the site of the source of that noise. The Federal agency must take into account such effects. Having said this, the Council understands the need for guidance on the subject of establishing areas of potential effects regarding the [*77712] particular concerns reflected in this comment and others. The Council will be developing such guidance.

Definition of APE is too broad, adding expense for surveys (usually borne by applicants), and unlawfully encompassing private or State lands. See answer above. Also, section 106 requires Federal agencies to take into account effects on historic properties regardless of whether they are located in private or public lands.

Section 800.16(e)

To the extent the Council seeks to prescribe a role for SHPOs, this definition should include in the alternative the comments of the SHPO. The comment is incorrect. The term "comment," as use on the rule, means the formal comments by the Council. The SHPO is never entrusted with that responsibility. The SHPO role through the process comes from its assistance responsibilities in the section 106 process (see section 101(b) of the NHPA).

Section 800.16(I)

The definition of effect should be consistent with language used to define area of potential effect (§ 800.16(d)) and the criteria of adverse effect (§ 800.5(a)(1)). The Council agreed and, for consistency, changed the rule so that the "alterations" is used for both definitions.

Section 800.16(w)

Several comments requested the Council to revise the rule to distinguish between section 101(d)(2), NPS approved THPOs and non-101(d)(2) tribes. They strongly recommend that different terms be used for these two types of tribes in order to more clearly reflect their different authorities on tribal lands. The Council agreed and changed the rule accordingly. In summary, the Council (1) deleted the reference to non-101(d)(2) tribes from the definition of "THPOs" on this section of the rule, and (2) revised the language regarding these consulting parties under section of § 800.2(c).

Section 800.16(x)

A definition of "dependent Indian communities" for the purposes of this regulation is needed. Folks need a legal definition from the Council. The Council used the definition of Indian tribes provided by the statute. The Council will bring this issue to the attention of the Department of the Interior and work on clarification.

Section 800.16(y)

The term "undertaking" needs to be better defined within the regulation so as to clearly eliminate actions with no potential to affect historic properties. Section 800.3(a)(1) provides at the beginning of the process that Federal agencies have no further section 106 responsibilities if the undertaking is not a type of activity that has the potential to affect historic properties.

Various comments requested in different forms that the Council should clarify that Federal funding is a condition precedent to the application of the section 106 process. The Council notes that there is case law supporting that position as well as case law stating that funding is not a prerequisite. The Council has maintained the statutory definition of "undertaking," verbatim, in the regulations. The Agency Official is responsible, in accordance with § 800.3(a), for making the determination as to whether a proposed Federal action is an undertaking. As appropriate, an agency should examine the nature of its Federal involvement taking into consideration factors such as the degree of Federal agency control or discretion; the type of Federal involvement or link to the action; and whether or not the action could move forward without Federal involvement. An agency should seek the advice of the Council when uncertain about whether or not its action falls within the definition of an undertaking.

Do not want incidental take permits (ITPs) under the Endangered Species Act to be subject to section 106 review. As stated before, the Council notes that this and other specific alternatives and exemptions should be decided after the appropriate § 800.14 process is followed and not through rulemaking itself. The Council encourages Federal agencies to submit proposed exemptions and other alternatives.

Various comments argued in various forms that Surface Mining Control and Reclamation Act (SMCRA) permits issued by States, after Office of Surface Mining (OSM) delegation of the program, are not subject to the section 106 process. The Council believes that it is the responsibility of the Federal agency, rather than the State, to comply with section 106. The Council intends to continue working with OSM to develop and finalize a solution to this issue.

The proposed rule does not apply to the siting of wireless facilities, since the construction of communications towers does not constitute a Federal undertaking. As stated before, this and several other issues mentioned by the telecommunications industry in this rulemaking process have been or are in the process of being addressed through ongoing discussions with the industry, the FCC and SHPOs. These discussions commenced before the present rulemaking process. Such ongoing discussions are referred hereinafter as "Telecommunications Working Group."

Appendix A

Various comments stated that Council participation in consultation should be mandatory when requested by a tribe, particularly because tribes are not mandatory signatories off tribal lands. The Council disagreed. The Council needs to retain discretion, just as it has in any other Section 106 reviews. Such discretion is necessary not only to allow the Council to manage its limited resources, but also to further encourage the goal of Agency and SHPO/THPO independence in the process. We have no evidence that this discretion is not being exercised appropriately.

The Council should change its rule to allow it to comment on the most important cases, involving the SHPOs/THPOs in an advisory capacity, not a managerial role. The Council believes the rule accomplishes this. Under the rule, the Council only gets involved in some of the cases meeting Appendix A criteria. The rule requires the Council to explain how such criteria is met before entering consultation, and provides SHPOs/THPOs with an advisory role.

General Consultation

The Council's "Handbook on Treatment of Archaeological Properties" is woefully out of date and should be updated as soon as possible. Also "Preparing Agreement Documents" should be revised to reflect the changes in the new regulations. The Council should also explore establishing peer review systems in resolving disputes that involve the identification, evaluation and/or treatment of archaeological sites. The Council agrees that the mentioned documents should be updated. Regarding the establishment of peer review systems, such an option could be explored.

Overly burdensome consultation requirements. Commenter cites seven different points of notification or consultation even when there are no historic properties present, and a dozen or more if there should be historic properties, resulting in unnecessary delays for thousands of routine projects. The commenter estimates that implementation and documentation of the numerous consultation points [*77713] **requires 1/4 to 1/2 FTE on every National Forest in the Southwest.** The rule provides for ways to tailor the process. The Council notes that a Programmatic Agreement under Section 800.14 should be suggested to the Forest Service. Such Programmatic Agreements have proved effective in the past in further streamlining and fitting the section 106 process to the particular needs of agency programs. The comment also raised an issue on the number of consultation points for situations where there are no historic properties affected. Consultation is necessary for an agency to learn whether historic properties are present or not,

and then whether and how those present would be affected. Section 106, again, requires the effects of undertakings on historic properties be taken into account. For that to happen, there has to be a process for identifying the properties and assessing the effects on such properties. As stated before, Section 800.14 presents several options an agency can pursue to advance an alternative way of complying with Section 106 which better fits the realities of their particular programs.

Some SHPO's have attempted to implement the Council's proposed Part 800 rules by treating the regulations as a springboard for additional, mandatory compliance steps and unreasonable documentation requirements that only serve to delay the review process. Clarify that SHPO's must follow proposed part 800's regulatory deadlines. Please refer to earlier responses regarding the 30 day time limits, above.

Proposed rules discourage SHPOs/THPOs from consulting with private sector companies and individuals seeking consultation regarding their projects. Government to government consultation if invoked by Tribes may prevent historic preservation matters from receiving their full consideration. As stated before, the rule has been changed to facilitate Federal agency authorizations for applicants to initiate the section 106 process. Government-to-government relationships between the Federal Government and Tribes is based on Presidential Memoranda, Executive Order 13084, treaties, and statutes. Furthermore, the Council believes that consultation with Tribes assures full consideration regarding historic properties on tribal lands or of significance to tribes.

Numerous provisions of proposed rule attempt to confer upon SHPO consultation, agreement (i.e., concurrence) or virtual veto powers. Section 106 does not mention any role for the SHPOs, let alone a requirement that the SHPO concur in agency determinations. SHPO's responsibilities, like the Council, are to assist and to advise. Proposed rule confers unauthorized powers on SHPOs and the Council, and result in additional administrative requirements and delays. The SHPO's role is limited in the rule to consulting and advising, based in their responsibilities pursuant to section 101(b)(3) of the NHPA. When a step calls for concurrence, SHPO concurrence can end the process from further evaluation. When the SHPO does not concur, a project is not vetoed; rather, the Federal agency is moved to the next, logical step in the process. Nothing in the rule gives anyone veto power over an undertaking. The Federal agency ultimately decides by itself what to do with the undertaking, once it has complied with its Section 106 responsibilities.

Council should confirm that SHPOs have no legal authority over private parties. Neither the Council nor this rule gives SHPOs the legal authority to require any action from private parties.

Nothing in the NHPA requires that every party that finds preservation to be interesting to be given a formal role in the section 106 process, with the ability to delay or derail Federal undertakings. The Council agrees, and believes that the rule reflects that regarding who are consulting parties and how the Federal agency can control who becomes an additional consulting party.

Proposed rules provide a mechanism for a Federal agency to proceed over the objections of SHPO/THPO or without an MOA, however, the Federal agency and its regulatees would have already paid a steep price for their efforts through project delays, duplicative legal reviews and other expenses associated with earlier consultation with SHPOs, THPOs, and ACHP. Section 106 of the NHPA requires Federal agencies to take into account the effects of their undertakings on historic properties and afford the Council a reasonable opportunity to comment. Just as with NEPA and other laws, Federal agency compliance with such obligations necessarily requires effort and time. Through various methods, such as time limits and program alternatives (which give Federal agencies the tools to further streamline and adapt the process to their needs), the Council has provided for cutting down such compliance costs.

Federal agencies often have no cultural resources expertise and therefore rely on SHPO to make findings for them. Although Council staff has urged SHPO offices not to be forced into this position, it is just too much work to get agencies to obtain the necessary expertise. This is an important program issue, but not a regulatory one. The Council and the National Park Service should work with agencies in this area.

Additional guidance may be needed to further clarify the roles of participating parties in the consultation process. The Council agrees that such guidance should be developed.

The length of the comment periods are well founded and prudent because they insures that the parties respond in a timely manner. The rule also clarifies and emphasizes opportunities for Tribes, Native American organizations, and the interested public to participate in consultation. The Council agrees.

General Negative

The regulations have strayed from the consultation and advisory process envisioned by Congress for "nationally significant historic sites." It is evidenced by Congress' enactment of section 101(a) of the NHPA that a site does not have to be of "national" significance in order to meet National Register criteria and be considered under section 106 review (sites of State or local significance can meet the criteria as well).

Section 106 process is unnecessary because it duplicates an existing local zoning review/approval process for radio towers (a process that considers the impact that proposed towers might have on nearby historic properties). Therefore, it imposes unnecessary costs on carriers, and those costs are invariably passed on to the consumers. Congress has determined that local governments-not the Federal Government-should resolve such issues as the location, height and design of communications facilities. While certain local zoning measures may address historic preservation concerns, Federal agency undertakings are still subject to section 106. The NHPA does not relieve them of this duty. As stated before, this and several other issues mentioned by the telecommunications industry in this rulemaking process have been or are in the process of being addressed through ongoing discussions with the industry, the FCC and SHPOs. One objective of this exercise is to better coordinate Federal and local review processes. These discussions commenced before the present rulemaking process.

Instead of imposing overly-detailed proscriptive regulations that are difficult to understand and enforce, the Council should work with agencies and others to develop incentive programs that encourage innovative and effective [*77714] **protection and preservation procedures. These could encourage compliance much more efficiently than the present enforcement model.** This can be done pursuant to the program alternatives under § 800.14 of the rule.

Council should suspend this rulemaking, and develop a new rule that contains: (1) Procedures that the Federal and State agencies can process and apply; (2) provisions that assign burdens and responsibilities that non-Federal entities can understand and reasonably support; and (3) an approach to preservation that equitably apportions responsibility and cost, and provides positive incentives for compliance. The Council believes the rule presents reasonable procedures that Federal agencies can process and apply. The vast majority of the thousands of section 106 reviews under the current and past rules have been conducted and concluded by Federal agencies without serious problems. The fact that disagreements sometimes arise regarding certain findings and determinations does not mean the process cannot be applied but, rather, reflects that it is being applied correctly. Disagreements and working out solutions is simply a part of a consultative process. The Council notes that, like section 106 itself, the rule only place requirements on Federal agencies. The incentive for Federal agency compliance, beyond meeting legal obligations set by the NHPA, is the furtherance of the historic preservation policies of the Federal Government, as expressed in the NHPA.

I do not think that the 1999 regulations have resulted in, or will in the foreseeable future result in, much streamlining of the process. The reduction in Council involvement has created a void. SHPOs do not carry sufficient respect to fill that authority void. I recommend that the regulations require the Council be notified as soon as either the Agency official or the SHPO expresses an opinion that an effect will be adverse; and that the Council be a signatory to all MOAs and PAs. The notification requirement is already in the rule (see § 800.6(a)(1)). The Council will not become a signatory to all MOAs, since a decision has been made to streamline the process by relying more on the Federal agency and SHPO/THPO for routine cases.

General Positive

General positive comments are summarized below, without a Council response beyond stating its agreement.

A comment asked that the Council refrain from further restricting public participation or "other consulting party" involvement in any way. It also ask, that the Council not vest any further authority in the SHPO or reduce the involvement of SHPOs, THPOs, and other consulting parties in agency decision making.

Other comments stated that: (1) the elimination of the distinction between "no historic properties" and "no effect" was a move in the right direction; (2) the rule is working well and that positive responses by certain Federal agencies had been noted; (3) the rule is very specific and provides sound guidance for federal agencies and other parties; (4) the rule clearly establishes the roles and responsibilities of the parties; (4) the rule works well and provides an efficient framework for the administration of the Act; (5) project review has been streamlined by reducing the need for Council review; (6) the rule is operating well, has appropriately defined the role of Federal agencies as the responsible party for section 106 compliance, achieves the objective of streamlining the process, and incorporates changes enacted in the 1992 amendments; (7) Federal agencies are beginning to assume their appropriate role as the lead in the process, and the

Council can focus on difficult cases and problem agencies; (8) the rules are an improvement over the 1986 regs; (9) the rule offers a constructive framework for consultation among SHPO, tribes and all interested parties.

Miscellaneous

Since implementing NHPA necessarily affects the agencies' regulatees, FCC recommends that the proposed rule include a "reasonable" time period for Federal agencies to develop their own implementing procedures. Federal agencies have always had the authority to develop implementing procedures pursuant to section 110(a)(2)(E). The Council has no role in setting deadlines for Federal agencies to develop these implementing procedures.

The deadlines for response from Council and SHPOs (15 days and 30 days) are reasonable-assuming adequate personnel to handle the workload. Because SHPO's are inadequately funded, they are understaffed to meet these time frames. Therefore, a 30 day review period for the Council and a 45-day review period for SHPOs is recommended. The Council disagrees. The current deadlines adequately balance the project need for expediency and the workloads of the Council and SHPO/THPOs.

General Tribal

In requesting that the role of THPO's and tribal representatives be clarified for those situations affecting properties of religious and cultural significance off tribal land, it is suggested that section 101(d)(2) limits THPO responsibilities and authority to tribal lands and does not require a Federal agency to consult with those tribes regarding properties of religious and cultural significance. The Council disagrees. Section 101(d)(6)(B) of the NHPA requires tribal consultation regarding historic properties of religious and cultural significance. Nothing in the statute makes a distinction that would limit such consultation to tribal lands.

It is inappropriate and illegal for Council to implement 1992 amendments regarding Indian Tribes through its proposed rule. Section 106 itself was not amended, and the Secretary of the Interior is the agency charged with promulgating regulations to implement the tribe-related amendments. The comment misreads the NHPA. The rule appropriately deals with tribal requirements as they directly relate to the section 106 process. The Council is authorized to promulgate rules to govern the implementation of section 106 "in its entirety." This authority necessarily covers all aspects that directly relate to the section 106 process. The 1992 amendments require Federal agencies to consult with tribes and Native Hawaiian Organizations in carrying out their Section 106 responsibilities. While the Department of the Interior provides assistance to tribes and fosters communication among tribes, SHPOs and agencies, it does not oversee the section 106 process nor have the requisite authority. It is noted that the Department of the Interior sits on the Council and voted in favor of adopting this rule.

Several THPOs have begun to request payment of fees for Section 106 consultation and have asserted THPO powers outside of tribal lands. Council could remove uncertainty and avoid delays by clarifying that THPOs are bound by the same rules as SHPOs and THPO authority extends only over tribal lands. This is a topic being addressed by the ongoing Telecommunications Working Group. Once the Council reaches a decision on this matter, it will be disseminated.

Concerned about several THPOs and tribal representatives requesting payment for the section 106 consultation required in the regulations and believes such actions are contrary to the regulations. This issue was raised by the wireless industry, and will be [*77715] addressed by the Telecommunications Working Group.

We would not support changes to grant expanded authority to tribes off tribal lands. We strongly support current provisions which enable tribes to participate, as appropriate. The Council agrees with this comment and did not expand the tribal role in this rule.

The proposed rule will impact us resulting in the consultation with Native Hawaiian organizations. The requirement for consultation with Native Hawaiian organizations will require expenditure of time and funds spent on EIS studies. The rule fails to specify which Hawaiian Native organizations (NHO) we would have to consult with, which may be many. The statute requires Federal agencies to conduct such consultation. The rule is not the appropriate venue for identifying specific NHOs. That is the responsibility of the Federal agency based on the potential to affect properties of significance to specific organizations.

E.O. 13084 has language that should be utilized in the section 106 process. EO 13084 addresses the development of Federal agency policies and regulations. The Council rule addresses individual projects and programs, and not these overall policies and rules developed by other agencies.

The regulations took a positive step regarding tribal input and participation. It works when the agency is truly in compliance with the regulations. Need to work on how tribes can be more involved; are legally involved in decision making without a specific agreement; and can be funded to conduct the work demanded by agencies and the regulations. The Council is developing guidance on tribal consultation.

The regulations conflict with the language and purpose of the Act by creating an artificial distinction between tribal properties depending on their location (on or off tribal lands). Tribes are provided lesser consultation rights where traditional cultural properties are located off tribal lands. The rule acknowledges tribal sovereignty on tribal lands, which necessarily distinguishes a tribe's role on and off tribal lands. The rule does not distinguish where properties are located, but only the scope of tribal involvement.

The regulations suggest that tribal governments and the interested public are at the same level of importance. This concept ignores the sovereign status of tribes and, as a result, Federal agencies are disrespecting some tribal treaties. An important statement of the tribal government role is missing. With the public on the same level as tribes, the public can gain access to documents that may compromise the confidentiality provisions of section 106. The Council disagrees. Section 800.2(c)(3) of the rule provides information for Federal agencies regarding sovereignty and the government-to-government responsibility. The public is simply notified and involved as appropriate but, unlike tribes in their land or regarding historic properties of significance to them, is not an entitled consulting party.

Legal Authority

Several comments questioned the Council's legal authority to issue the rule. The main arguments were that: (1) The Council was given advisory functions by the statute, and that the proposed rule transformed the role of the Council from purely advisory to one with substantive regulatory authority over other Federal agencies and parties; (2) the Council could only issue regulations regarding how it issued its comments (from the "reasonable opportunity to comment" provided by section 106); and (3) there was no statutory basis for a rule that dictates how an agency takes into account the effects of its undertakings or the Council's comments.

The Council believes that the rule is properly characterized as one providing a process to be followed. Nowhere does the rule impose an outcome on a Federal agency as to how it will decide whether or not to approve an undertaking, or how. The rule merely provides a process that assures that the Federal agency takes into account the effects of the undertaking on historic properties. It does not impose in any way whatsoever how such consideration will affect the final decision of the Federal agency on the undertaking. The rule does not provide anyone with a veto power over an undertaking.

Furthermore, the Council believes it has the authority to promulgate the present rule. Section 211 of the NHPA states that: "The Council is authorized to promulgate such rules and regulations as it deems necessary to govern the implementation of section 106 of [the NHPA] in its entirety." The phrase "in its entirety" was added by the 1992 amendments to the NHPA. Directly talking to the meaning of the "in its entirety" amendment, the summary of the amendments stated that: "This makes clear that the ACHP has the authority to define not only how agencies will afford the Council a reasonable opportunity to comment, but also how agencies should take effects on historic properties into account in their planning." Congressional Record, Senate, S 3575, March 19, 1991. This amendment was specifically introduced to address the authority issues raised earlier. Thus, it is clear that Congress has given the Council the authority to promulgate rules, such as the present one, setting forth how Federal agencies are to meet all their section 106 responsibilities to take into account the effects of their undertakings on historic properties, as well as to provide the Council with a reasonable opportunity to comment.

Moreover, the rule is solidly based on the requirements of the statute and, as Congress intended, provides a predictable framework which fleshes out those requirements. As stated before, section 106 specifically requires Federal agencies to take into account the effects of their undertakings on historic properties. *16 U.S.C. 470f.* The first general step in the process under the rule requires Federal agencies to identify the historic properties that may be affected by the undertaking. *36 CFR 800.4*. It is simply impossible for an agency to take into account the effects of its undertaking on historic properties if it does not even know what those historic properties are in the first place.

The second general step in the process is for the Federal agency to assess the effects of the undertaking on the historic property. *36 CFR 800.5*. Again, an agency cannot take into account effects on historic properties if it does not first assess the nature of those effects. The Council has utilized its considered expertise on historic preservation to create the criteria of adverse effect that guides the end of this step.

The third general step in the process under the challenged rule is to consult to attempt resolving adverse effects to historic properties (through what is called a Memorandum of Agreement), if it has been determined the effects are actually adverse. *36 CFR 800.6.* Such an approach is explicitly sanctioned by the statute under Section 110(l) of the National Historic Preservation Act. *16 U.S.C. 470h-2*(l). Specifically, Section 110(l) of the statute states that:

With respect to any undertaking subject to section 106 which adversely affects any [historic property], *and for which a Federal agency has not entered into an agreement pursuant to regulations issued by the Council, the head of such agency shall document any decision made pursuant to section 106... Where a section 106 memorandum of agreement has been executed with respect to an undertaking,* [*77716] such memorandum shall govern the undertaking and all its parts.

Id. (emphasis added). It bears mentioning that this section was amended by Congress after the section 106 rule that went into effect in 1999. The amendment further conformed the statute to that 1999 rule, which was used as the proposal in the present rulemaking. Specifically, section 5(a)(8) of HR 834, amended the language of section 110(l) by striking "with the Council" and inserting "pursuant to regulations issued by the Council."

In the last general step in the process, the Council issues comments to the Federal agencies that fail to resolve adverse effects. Such a step is obviously contemplated in the requirements of section 106 that the Council be given "a reasonable opportunity to comment." *16 U.S.C. 470f.*

The rule does provide for consultation with various parties throughout the process. Such consultation requirements with State Historic Preservation Officers, Tribal Historic Preservation Officers and certain federally recognized Indian Tribes and Native Hawaiian Organizations are solidly anchored on statutory requirements that Federal agencies consult with such parties. *See e.g. 16 U.S.C. 470a*(b)(3)(I), 470a(d)(2), and 470a(d)(6)(B). The general public is also given a general role under the rule, although such role does not rise to the level of that of consulting parties. The Council believes this role for the public is reasonable and authorized. The Federal agency's consideration of how its undertaking affects historic properties is enhanced and better informed by the participation of the consulting parties and the general public, for whose enjoyment and enrichment the NHPA seeks to protect historic properties. It must be kept in mind that such public is the one that lives in the communities and areas where the historic properties are located, and therefore may have uniquely informed viewpoints as to such properties. As stated above, the rule specifically states that Federal agencies can use their own procedures for public involvement in lieu of those under subpart B of this rule, so long as they provide adequate opportunities consistent with the rule. Such procedural consistency is no more than what the NHPA requires under *16 U.S.C. 470h-2*(a)(2)(E).

Appointments Clause

Some comments argued that the present rulemaking process violates the Appointments Clause of the Constitution. This argument is summarized as follows: (a) The section 106 rule that went into effect in 1999 (1999 rule) was developed and adopted in violation of the Appointments Clause due to the participation of the Chairman of the National Trust on Historic Preservation (the Trust) and the President of the National Conference of State Historic Preservation Officers (NCSHPO) (both of whom are members of the Council not appointed by the President) in the development and adoption of that 1999 rule; and (b) since the content of that 1999 rule was used as the proposed rule in the present rulemaking, the present rulemaking process is incurably tainted and unconstitutional.

The Council strongly disagrees with such arguments. As has been stated before, the Trust and NCSHPO have not participated in any way whatsoever in the deliberations, decisions, votes, or any other Council activities related to this rulemaking. On June 23, 2000, the Council membership, minus the representatives of the Trust and NCSHPO, took a new vote on the adoption of the 1999 rule. It voted 16-0 in favor of the 1999 rule. As has been stated above, that 1999 rule was the culmination of six years of work by the Council members, Council staff, public comments and public meetings.

Again without the participation of the representatives of the Trust and NCSHPO, the Council proceeded to vote unanimously in favor of proceeding with the present rulemaking process, using the text of the 1999 rule as the proposed rule. Many of these Council members (all Presidential appointees) had participated in the drafting and original, unanimous adoption of the 1999 rule on February of 1999. On June 23, 2000, they decided to use that 1999 rule as the proposed rule. On November 17, 2000, after taking into account public comment and changing the proposed rule as they deemed appropriate, these Presidentially appointed Council members (without the participation of the representatives of the Trust and NCSHPO) voted to adopt the final rule now being published.

Any prior involvement in the rule does not represent the exercise of significant authority pursuant to the laws of the United States contemplated by the Appointments Clause. The Presidential appointees considering the draft, proposed rule during the 2000 rulemaking process were at full liberty to vote against it, amend it, or adopt it. In the end, the final decision to move forward with such draft was in their power.

In the present rulemaking, any act that could arguably be deemed an exercise of significant authority has been carried out solely by the Council's Presidential appointees.

Other Legal Issues

Certain comments indicated a belief that the proposed rule violates the Establishment Clause of the Constitution. The arguments stated that to the extent the proposed rule requires Federal agencies to conform their decisionmaking under section 106 based on the "religious and cultural significance" of properties (as determined by Tribes) it results in an excessive entanglement between the government and religion, impermissibly restricts the use of public lands on the basis of religion, and impermissibly establishes or favors religion, in violation of the Establishment Clause.

The Council strongly disagrees. The rule does not require Federal agencies to conform their decisionmaking based on the religious and cultural significance of properties. As stated before, the NHPA and the rule only clarify that properties of religious and cultural significance to Tribes " *may* be determined to be eligible for inclusion on the National Register." section 101(d)(6)(A) of the NHPA. Like any other property of any kind, in order for properties with such significance to be considered in the section 106 process, they must first meet the established, objective, secular criteria of the National Register of Historic Places. The determination as to whether a property meets that criteria is made by the Federal agency in concurrence with the SHPO/THPO or, in the case of disagreement, by the Keeper of the National Register. Furthermore, once a historic property has been so identified, all that Federal agencies are required to do is to take into account the effects of their undertaking on such property. Nothing whatsoever in the rule imposes an obligation on the Federal agency to change, reject or approve an undertaking based on the religious and cultural significance of a property.

The rule and section 101(d)(6) of the NHPA only require consultation with Indian Tribes regarding those historic properties of significance to them. The Federal agency must consult with such Tribes, but is nowhere required to abide by the opinions expressed by the Tribes in such consultations. Furthermore, such consultation provisions are fully justified and reasonable. They do not provide Tribes with a "special treatment," but rather a rational treatment. Just as it would be common sense for a person to consult, for example, with the Navy in order to seek a better understanding of the history of [*77717] Pearl Harbor, it is more than rational to go to Tribes to seek a better understanding of historic properties to which they attach a religious and cultural significance. Due to their history and experience with such properties, such Tribes are in a specially advantageous position to provide valuable information about them. At the very least, the Council believes that these Tribal consultation provisions of the rule and of section 101(d)(6) of the NHPA are tied rationally to the fulfillment of the Federal Government's unique obligations towards Tribes. See *Morton v. Mancari, 417 U.S. 535 (1974).*

IV. Description of Meaning and Intent of Specific Sections

The following information clarifies the meaning and intent behind particular sections of the final rule.

Subpart A--Purposes and Participants

Section 800.1(b). This section makes clear that references in the section 106 regulations are not intended to give any additional authority to implementing guidelines, policies or procedures issued by any other Federal agency. Where such provisions are cited, they are simply to assist users in finding related guidance, which is non-binding, or requirements of related laws, which may be mandatory depending on the particular law itself.

Section 800.1(c). The purpose of this section is to emphasize the flexibility an Agency Official has in carrying out the steps of the section 106 process, while acknowledging that early initiation of the process is essential and that actions taken to meet the procedural requirements must not restrict the effective consideration of alternatives related to historic preservation issues in later stages of the process.

Section 800.2(a). The term "Agency Official" is intended to include those Federal officials who have the effective decision making authority for an undertaking. This means the ability to agree to such actions as may be necessary to comply with section 106 and to ensure that any commitments made as a result of the section 106 process are indeed

carried out. This authority and the legal responsibilities under section 106 may be assumed by non-Federal officials only when there is clear authority for such an arrangement under Federal law, such as under certain programs administered by the Department of Housing and Urban Development. This subsection indicates that the Federal Agency must ensure that the Agency Official "takes... financial responsibility for section 106 compliance..." This phrase is not to be construed as prohibiting Federal agencies from passing certain section 106 compliance costs to applicants. Such a construction of the regulation would contravene section 110(g) of the NHPA and *16 U.S.C. 469c-2.* The intent behind the reference to "financial responsibility" in the regulation is, as stated above, to ensure that the Agency Official has the effective decision making authority for an undertaking.

Section 800.2(a)(1). This reference to the Secretary's professional standards is intended to remind Federal agencies that this independent but related provision of the Act may affect their compliance with section 106.

Section 800.2(a)(2). This provision allows, but does not require, Federal agencies to designate a lead agency for section 106 compliance purposes. The lead agency carries out the duties of the Agency Official for all aspects of the undertaking. The other Federal agencies may assist the lead agency as they mutually agree. When compliance is completed, the other Federal agencies may use the outcome to document their own compliance with section 106 and must implement any provisions that apply to them. This provision does not prohibit an agency to independently pursue compliance with section 106 for its obligations under section 106, although this should be carefully coordinated with the lead agency. A lead agency can sign the Memorandum of Agreement for other agencies, so long as that is part of the agreement among the agencies for creating the lead agency arrangement. It should also be clear in the Memorandum of Agreement.

Section 800.2(a)(4). This section sets forth the general concepts of consultation. It identifies the duty of Federal agencies to consult with other partes at various steps in the section 106 process and acknowledges that consultation varies depending on a variety of factors. It also encourages agencies to coordinate section 106 consultation with that required under other Federal laws and to use existing agency processes to promote efficiency.

Section 800.2(b). The Council will generally not review the determinations and decisions reached in accordance with these regulations by the Agency Official and appropriate consulting parties and not participate in the review of most section 106 cases. However, because the statutory obligation of the Federal agency is to afford the Council a reasonable opportunity to comment on its undertaking's effects upon historic properties, the Council will oversee the section 106 process and formally become a party in individual consultations when it determines there are sufficient grounds to do so. These are set forth in Appendix A. The Council also will provide participants in the section 106 process with its advice and guidance in order to facilitate completion of the section 106 review.

Section 800.2(c). This section sets a standard for involving various consulting parties. The objective is to provide parties with an effective opportunity to participate in the section 106 process, relative to the interest they have to the historic preservation issues at hand.

Section 800.2(c)(1). This section recognizes the central role of the SHPO in working with the Agency Official on section 106 compliance in most cases. It also delineates the manner in which the SHPO may get involved in the section 106 process when a THPO has assumed SHPO functions on tribal lands.

Section 800.2(c)(2). The role of THPO was created in the 1992 amendments to the Act. This section tracks the statutory provision relating to THPO assumption of the SHPO's section 106 role on tribal lands. In such circumstances, the THPO substitutes for the SHPO and the SHPO participates in the section 106 process only as specified in 800.2(c)(1) or as a member of the public. This section also specifies that in those instances where an undertaking occurs on or affects properties on tribal lands and a tribe has not officially assumed the SHPO's section 106 responsibilities on those lands, the Agency Official still consults with the SHPO, but also consults with a representative designated by the Indian tribe. Such designation is made in accordance with tribal law and procedures. However, if the tribe has not designated such a representative, the Agency Official would consult with the tribe's chief elected official, such as the tribal chairman.

Section 800.2(c)(3). This section embodies the statutory requirement for Federal agencies to consult with Indian tribes and Native Hawaiian organizations throughout the section 106 process when they attach religious and cultural significance to historic properties that may be affected by an undertaking. It is intended to promote continuing and effective consultation with those parties throughout the section 106 process. Such consultation is intended to be conducted in a manner that is fully cognizant of the legal rights of Indian tribes and that is sensitive to their cultural traditions and practices.

Section 800.2(c)(3)(i). This subsection has two main purposes. First, it emphasizes the importance of involving Indian tribes and Native Hawaiian organizations early and fully at all stages of the section 106 process. [*77718] Second, Federal agencies should solicit tribal views in a manner that is sensitive to the governmental structures of the tribes, recognizing that confidentiality and communication issues may require Federal agencies to allow more time for the exchange of information. Also, this section states that the Agency Official must make a "reasonable and good faith effort" to identify interested tribes and Native Hawaiian organizations. This means that the Agency Official may have to look beyond reservations and tribal lands in the project's vicinity to seek information on tribes that had been historically located in the area, but are no longer there.

Section 800.2(c)(3)(iii). This subsection emphasizes the need to consult with Indian tribes on a government-to-government basis. The Agency Official must consult with the appropriate tribal representative, who must be selected or designated by the tribe to speak on behalf of the tribe. Matters of protocol are important to Indian tribes. Indian tribes and Native Hawaiian organization may be reluctant to share information about properties to which they attach religious and cultural significance. Federal agencies should recognize this and be willing to identify historic properties without compromising concerns about confidentiality. The Agency Official should also be sensitive to the internal workings of a tribe and allow the time necessary for the tribal decision making process to operate.

Section 800.2(c)(3)(iv). This subsection reminds Federal agencies of the statutory duty to consult with Indian tribes and Native Hawaiian organizations whether or not the undertaking or its effects occur on tribal land. Agencies should be particularly sensitive in identifying areas of traditional association with tribes or a Native Hawaiian organizations, where historic properties to which they attach religious and cultural significance may be found.

Section 800.2(c)(3)(v). Some Federal agencies have or may want to develop special working relationships with Indian tribes or Native Hawaiian organization to provide specific arrangements for how they will adhere to the steps in the section 106 process and enhance the participation of tribes and Native Hawaiian organizations. Such agreements are not mandatory; they may be negotiated at the discretion of Federal agencies. The agreements cannot diminish the rights set forth in the regulations for other parties, such as the SHPO, without that party's express consent.

Section 800.2(c)(3)(vi). The signature of tribes is required where a Memorandum of Agreement concerns tribal lands. However, if a tribe has not formally assumed the SHPO's responsibilities under section 101(d)(2) the tribe may waive its signature rights at its discretion. This will allow tribes the flexibility of allowing agreements to go forward regarding tribal land, but without condoning the agreement with their signature.

Section 800.2(c)(4). Affected local governments must be given consulting party status if they so request. Under § 800.3(f)(1), Agency Officials are required to invite such local governments to be consulting parties. This subsection provides for that status and also reminds Federal agencies that some local governments may act as the Agency Official when they have assumed section 106 legal responsibilities, such as under certain programs administered by the Department of Housing and Urban Development.

Section 800.2(c)(5). Applicants for Federal assistance or for a Federal permit, license or other approval are entitled to be consulting parties. Under § 800.3(f)(1), Agency Officials are required to invite them to be consulting parties. Also, Federal agencies have the legal responsibility to comply with section 106 of the NHPA. In fulfilling their responsibilities, Federal agencies sometimes choose to rely on applicants for permits, approvals or assistance to begin the 106 process. The intent was to allow applicants to contact SHPOs and other consulting parties, but agencies must be mindful of their government-to-government consultation responsibilities when dealing with Indian tribes. If a Federal agency implements its 106 responsibilities in this way, the Federal agency remains legally responsible for the determinations. Applicants that may assume responsibilities under a Memorandum of Agreement must be consulting parties in the process leading to the agreement.

Section 800.2(c)(6). This section allows for the possibility that other individuals or entities may have a demonstrated special interest in an undertaking and that Federal agencies and SHPO/THPOs should consider the involvement of such individuals or entities as consulting parties. This might include property owners directly affected by the undertaking, non-profit organizations with a direct interest in the issues or affected businesses. Under § 800.3(f)(3), upon written request and in consultation with the SHPO/THPO and any Indian tribe upon whose tribal lands an undertaking occurs or affects historic properties, an Agency Official may allow certain individuals under § 800.2(c)(6) to become consulting parties.

Section 800.2(d)(1). Public involvement is a critical aspect of the 106 process. This section is intended to set forth a standard that Federal agencies must adhere to as they go through the section 106 process. The type of public involve-

ment will depend upon various factors, including but not limited to, the nature of the undertaking, the potential impact, the historic property, and the likely interest of the public. Confidentiality concerns include those specified in section 304 of the Act and legitimate concerns about proprietary information, business plans and privacy of property owners.

Section 800.2(d)(2). This subsection is intended to set the notice standard. Notice, with sufficient information to allow meaningful comments, must be provided to the public so that the public can express its views during the various stages and decision making points of the process.

Section 800.2(d)(3). It is intended that Federal agencies have flexibility in how they involve the public, including the use of NEPA and other agency planning processes, as long as opportunities for such public involvement are adequate and consistent with subpart A of the regulations.

Subpart B--The section 106 Process

Section 800.3. This new section is intended to encourage Federal agencies to integrate the section 106 process into agency planning at its earliest stages.

Section 800.3(a). The determination of whether or not an undertaking exists is the Agency Official's determination. The Council may render advice on the existence of an undertaking, but ultimately this remains a Federal agency decision.

Section 800.3(a)(1). This section explains that if there is an undertaking, but it is not a type of activity that has the potential to affect a historic property, then the agency is finished with its section 106 obligations. There is no consultation requirement for this decision.

Section 800.3(a)(2). This is a reminder to Federal agencies that adherence to the standard 106 process in Subpart B is inappropriate where the undertaking is governed by a program alternative established pursuant to § 800.14.

Section 800.3(b). This section does not impose a mandatory requirement on Federal agencies. It emphasizes the benefit of coordinating compliance with related statutes so as to enhance [*77719] efficiency and avoid duplication of efforts, but the decision is up to the Agency Official. Agencies are encouraged to use the information gathered for these other processes to meet section 106 needs, but the information must meet the standards in these regulations.

Section 800.3(c). This sets forth the responsibility to properly identify the appropriate SHPO or THPO that must be consulted. If the undertaking is on or affects historic properties on tribal lands, then the agency must determine what tribe is involved and whether the tribe has assumed the SHPO's responsibilities for section 106 under section 101(d)(2) of the Act. A list of such tribes is available from the National Park Service.

Section 800.3(c)(1). This section reiterates that the tribe may assume the role of the SHPO on tribal land and tracks the language of the Act in specifying how certain owners of property on tribal lands can request SHPO involvement in a section 106 case in addition to the THPO.

Section 800.3(c)(2). This section is the State counterpart to Federal lead agencies and has the same effect. It allows a group of SHPOs to agree to delegate their authority under these regulations for a specific undertaking to one SHPO.

Section 800.3(c)(3). This section reinforces the notion that the conduct of consultation may vary depending on the agency's planning process, the nature of the undertaking and the nature of its effects.

Section 800.3(c)(4). This section makes it clear that failure of an SHPO/THPO to respond within the time frames set by the regulation permit the agency to assume concurrence with the finding or to consult about the finding or determination with the Council in the SHPO/THPO's absence. It also makes clear that subsequent involvement by the SHPO/THPO is not precluded, but the SHPO/THPO cannot reopen a finding or determination that it failed to respond to earlier.

Section 800.3(d). This section specifies that, on tribal lands, the Agency Official consults with both the Indian tribe and the SHPO when the tribe has not formally assumed the responsibilities of the SHPO under section 101(d)(2) of the Act. It also allows the section 106 process to be completed even when the SHPO has decided not to participate in the process, and for the SHPO and an Indian tribe to develop tailored agreements for SHPO participation in reviewing undertakings on the tribe's lands.

Section 800.3(e). This section requires the Agency Official to decide early how and when to involve the public in the section 106 process. It does not require a formal "plan," although that might be appropriate depending upon the scale of the undertaking and the magnitude of its effects on historic properties.

Section 800.3(f). This is a particularly important section, as it requires the Agency Official at an early stage of the section 106 process to consult with the SHPO/THPO to identify those organizations and individuals that will have the right to be consulting parties under the terms of the regulations. These include local governments, Indian tribes and Native Hawaiian organizations and applicants for Federal assistance or permits, especially those who may assume a responsibility under a Memorandum of Agreement (see § 800.6(c)(2)(ii)). Others may request to be consulting parties, but that decision is up to the Agency Official.

Section 800.3(g). This section makes it clear that an Agency Official can combine individual steps in the section 106 process with the consent of the SHPO/THPO. Doing so must protect the opportunity of the public and consulting partes to participate fully in the section 106 process as envisioned in § 800.2.

Section 800.4(a). This section sets forth the consultative requirements involved in the scoping efforts at the beginning stages of the identification process. The Agency Official must consult with the SHPO/THPO in fulfilling the steps in subsections (1) through (4). This section emphasizes the need to consult with the SHPO/THPO at all steps in the scoping process. It also highlights the need to seek information from Indian tribes and Native Hawaiian organizations with regard to properties to which they attach religious and cultural significance, while being sensitive to confidentiality concerns. Where Federal agencies are engaged in an action that is on or may affect ancestral, aboriginal or ceded lands, Federal agencies must consult with Indian tribes and Native Hawaiian organizations with regard to historic properties of traditional religious and cultural significance on such lands.

Section 800.4(b). This section sets out the steps an Agency Official must follow to identify historic properties. It is close to the section 106 process under the 1986 regulations, with increased flexibility of timing and greater involvement of Indian tribes and Native Hawaiian organizations in accordance with the 1992 amendments to the Act.

Section 800.4(b)(1). This section on level of effort required during the identification processes has been added to allow for flexibility. It sets the standard of a reasonable and good faith effort on behalf of the agency to identify properties and provides that the level of effort in the identification process depends on numerous factors including, among others listed, the nature of the undertaking and its corresponding potential effects on historic properties.

Section 800.4(b)(2). This new section is also intended to provide Federal agencies with flexibility when several alternatives are under consideration and the nature of the undertaking and its potential scope and effect has therefore not yet been completely defined. The section also allows for deferral of final identification and evaluation if provided for in an agreement with the SHPO/THPO or other circumstances. Under this phased alternative, Agency Officials are required to follow up with full identification and evaluation once project alternatives have been refined or access has been gained to previously restricted areas. Any further deferral of final identification would complicate the process and jeopardize an adequate assessment of effects and resolution of adverse effects.

Section 800.4(c). This section sets out the process for determining the National Register eligibility of properties not previously evaluated for historic significance.

Section 800.4(c)(2). This section provides that if an Indian tribe or Native Hawaiian organization disagrees with a determination of eligibility involving a property to which it attaches religious and cultural significance, then the tribe can ask the Council to request that the Agency Official obtain a determination of eligibility. The Council retains the discretion as to whether or not it should make the request of the Agency Official. This section was intended to provide a way to ensure appropriate determinations regarding properties, located off tribal lands, to which tribes attach religious and cultural significance.

Section 800.4(d)(1). This section describes the closure point in the section 106 process where no historic properties are found or no effects on historic properties are found. Consulting parties must be specifically notified of the determination, but members of the public need not receive direct notification; the Federal agency must place its documentation in a public file prior to approving the undertaking, and provide access to the information when requested by the public. Once the consulting parties are notified, the SHPO/THPO has 30 days to object to the determination. The Council may also [*77720] object on its own initiative within the time period. Lack of such objection within the 30 day period means that the agency need not take further steps in the Section 106 process.

Section 800.4(d)(2). This section requires that the Federal agency proceed to the adverse effect determination step where it finds that historic properties may be affected or the SHPO/THPO or Council objects to a no historic properties affected finding. The agency must notify all consulting parties.

Section 800.5(a). This section provides for Indian tribe and Native Hawaiian organization consultation where historic properties to which they attach religious and cultural significance are involved. This section also requires the Agency Official to consider the views of consulting parties and the public that have already been provided to the Federal agency.

Section 800.5(a)(1). This section codifies the practice of the Council in considering both direct and indirect effects in making an adverse effect determination. This section allows for consideration of effects on the qualifying characteristics of a historic property that may not have been part of the property's original eligibility evaluation. The last sentence in this section is intended to amplify the indirect effects concept, similar to the NEPA regulations, which calls for consideration of such effects when they are reasonably foreseeable effects.

Section 800.5(a)(2)(ii). The list of examples of adverse effects has been modified by eliminating the exceptions to the adverse effect criteria. However, if a property is restored, rehabilitated, repaired, maintained, stabilized, remediated or otherwise changed in accordance with the Secretary's standards, then it will not be considered an adverse effect.

Section 800.5(a)(2)(iii). This subsection, along with § 800.5(a)(2)(I), would encompass recovery of archeological data as an adverse effect, even if conducted in accordance with the Secretary's standards. This acknowledges the reality that destruction of a site and recovery of its information and artifacts is adverse. It is intended that in eliminating data recovery as an exception to the adverse effect criteria, Federal agencies will be more inclined to pursue other forms of mitigation, including avoidance and preservation in place, to protect archeological sites.

Section 800.5(a)(2)(iv). This section tracks the National Register criteria regarding the relation of alterations to a property's use or setting to the significance of the property.

Section 800.5(a)(2)(v). This section tracks the language of the National Register criteria as it pertains to the property's integrity.

Section 800.5(a)(2)(vi). This section acknowledges that where properties of religious and cultural significance to Indian tribes or Native Hawaiian organizations are involved, neglect and deterioration may be recognized as qualities of those properties and thus may not necessarily constitute an adverse effect.

Section 800.5(a)(2)(vii). If a property is transferred leased or sold out of Federal ownership with proper preservation restrictions, then it will not be considered an adverse effect. Transfer between Federal agencies is not an adverse effect per se; the purpose of the transfer should be evaluated for potential adverse effects, so that they can be considered before the transfer takes place.

Section 800.5(a)(3). This section is intended to allow flexibility in Federal agency decision making processes and to recognize that phasing of adverse effect determinations, like identification and evaluation, is appropriate in certain planning and approval circumstances, such as the development of linear projects where major corridors are first assessed and then specific route alignment decisions are made subsequently.

Section 800.5(b). This section allows SHPO/THPO's the ability to suggest changes in a project or suggest conditions so that adverse effects can be avoided and thus result in a no adverse effect determination. It is also written to emphasize that a finding of no adverse effect is only a proposal when the Agency Official submits it to the SHPO/THPO for review. This provision also acknowledges that the practice of "conditional No Adverse Effect determinations" is acceptable.

Section 800.5(c). The Council will not review "no adverse effect" determinations on a routine basis. The Council will intervene and review no adverse effect determinations if it deems it appropriate based on the criteria listed in Appendix A or if the SHPO/THPO or another consulting party and the Federal agency disagree on the finding and the agency cannot resolve the disagreement. The SHPO/THPO and any consulting party wishing to disagree to the finding must do so within the 30-day review period. If Indian tribes or Native Hawaiian organizations disagree with the finding, they can request the Council's review directly, but this must be done within the 30 day review period. If a SHPO/THPO fails to respond to an Agency Official finding within the 30 day review period, then the Agency Official can consider that to be SHPO/THPO agreement with the finding. When a finding is submitted to the Council, it will have 15 days for review; if it fails to respond within the 15 days, then the Agency Official may assume Council concurrence with the

finding. When it reviews no adverse effect determinations, the Council will limit its review to whether or not the criteria have been correctly applied.

Section 800.5(d). Agencies must retain records of their findings of no adverse effect and make them available to the public. This means that the public should be given access to the information, subject to FOIA and other statutory limits on disclosure such as section 304 of the NHPA, when they so request. Failure of the agency to carry out the undertaking in accordance with the finding requires the Agency Official to reopen the section 106 process and determine whether the altered course of action constitutes an adverse effect. A finding of adverse effect requires further consultation on ways to resolve it.

Section 800.6(a)(1). When adverse effects are found, the consultation must continue among the Federal agency, SHPO/THPO and consulting parties to attempt to resolve them. The Agency Official must notify the Council when adverse effects are found and should invite the Council to participate in the consultation when the circumstances in § 800.6(a)(1)(i)(A)-(C) exist. A consulting party may also request the Council to join the consultation. The Council will decide on its participation within 15 days of receipt of a request, basing its decision on the criteria set forth in Appendix A. Whenever the Council decides to join the consultation, it must notify the Agency Official and the consulting parties. It must also advise the head of the Federal agency of its decision to participate. This is intended to keep the policy level of the Federal agency apprized of those cases that the Council has determined present issues significant enough to warrant its involvement.

Section 800.6(a)(2). This section allows for the entry of new consulting parties if the agency and the SHPO/THPO (and the Council, if participating) agree. If they do not agree, it is desirable for them to seek the Council's opinion on the involvement of the consulting party. Any party, including applicants, licensees or permittees, that may have responsibilities under a Memorandum of Agreement must be invited to participate as consulting parties in reaching the agreement.

Section 800.6(a)(3). This section specifies the Agency Official's [*77721] obligation to provide project documentation to all consulting partes at the beginning of the consultation to resolve adverse effects. Particular note should be made of the reference to the confidentiality provisions.

Section 800.6(a)(4). The Federal agency must provide an opportunity for members of the public to express their views on an undertaking. The provision embodies the principles of flexibility, relating the agency effort to various aspects of the undertaking and its effects upon historic properties. The Federal agency must provide them with notice such that the public has enough time and information to meaningfully comment. If all relevant information was provided at earlier stages in the process in such a way that a wide audience was reached, and no new information is available at this stage in the process that would assist in the resolution of adverse effects, then a new public notice may not be warranted. However, this presumes that the public had the opportunity to make its views known on ways to resolve the adverse effects.

Section 800.6(a)(5). Although it is in the interest of the public to have as much information as possible in order to provide meaningful comments, this section acknowledges that information may be withheld in accordance with section 304 of the NHPA.

Section 800.6(b). If the Council is not a part of the consultation, then a copy of the Memorandum of Agreement must be sent to the Council so that the Council can include it in its files to have an understanding of a Federal agency's implementation of section 106. This does not provide the Council an opportunity to reopen the specific case, but may form the basis for other actions or advice related to an agency's overall performance in the section 106 process.

Section 800.6(b)(1). When resolving adverse effects without the Council, the Agency Official consults with the SHPO/THPO and other consulting parties to develop a Memorandum of Agreement. If this is achieved, the agreement is executed between the Agency Official and the SHPO/THPO and filed with required documentation with the Council. This filing is the formal conclusion of the section 106 process and must occur before the undertaking is approved. Standard treatments adopted by the Council may set expedited ways for competing memoranda of agreement in certain circumstances.

Section 800.6(b)(2). When the Council is involved, the consultation proceeds in the same manner, but the agreement of the Agency Official, the SHPO/THPO and the Council is required for a Memorandum of Agreement.

Section 800.6(c). This section details the provisions relating to Memoranda of Agreement. This document evidences an agency's compliance with section 106 and the agency is obligated to follow its terms. Failure to do so requires the Agency Official to reopen the section 106 process and bring it to suitable closure as prescribed in the regulations.

Section 800.6(c)(1). This section sets forth the rights of signatories to an agreement and identifies who is required to sign the agreement under specific circumstances. The term "signatory" has a special meaning as described in this section, which is the ability to terminate or agree to amend the Memorandum of Agreement. The term does not include others who sign the agreement as concurring parties.

Section 800.6(c)(2). Certain parties may be invited to be signatories in addition to those specified in § 800.6(c)(1). They include individuals and organizations that should, but do not have to, sign agreements. It is particularly desirable to have parties who assume obligations under the agreement become formal signatories. However, once invited signatories sign MOAs, they have the same rights to terminate or amend the MOA as the other signatories.

Section 800.6(c)(3). Other parties may be invited to concur in agreements. They do not have the rights to amend or terminate an MOA. Their signature simply shows that they are familiar with the terms of the agreement and do not object to it.

Sections 800.6(c)(4)-(9). These sections set forth specific features of a Memorandum of Agreement and the way it can be terminated or amended.

Section 800.7. This section specifies what happens when the consulting parties cannot reach agreement. Usually when consultation is terminated, the Council renders advisory comments to the head of the agency, which must be considered when the final agency decision on the undertaking is made.

Section 800.7(a)(1). This section requires that the head of the agency or an Assistant Secretary or officer with major department-wide or agency-wide responsibilities must request Council comments when the Agency Official terminates consultation. Section 110(l) of the NHPA requires heads of agencies to document their decision when an agreement has not been reached under section 106. If the agency head is responsible for documenting the decision, it is appropriate that the same individual request the Council's comments.

Section 800.7(a)(2). This section allows the Council and the Agency Official to conclude the section 106 process with a Memorandum of Agreement between them if the SHPO terminates consultation.

Section 800.7(a)(3). If a THPO terminates consultation, there can be no agreement with regard to undertakings that are on or affect properties on tribal lands and the Council will issue formal comments. This provision respects the tribe's unique sovereign status with regard to its lands.

Section 800.7(a)(4). This section governs cases where the Council terminates consultation. In that case, the Council has the duty to notify all consulting parties prior to commenting. The role given to the Federal Preservation Officer is intended to fulfill the NHPA's goal of having a central official in each agency to coordinate and facilitate the agency's involvement in the national historic preservation program.

Section 800.7(b). This section allows the Council to provide advisory comments even though it has signed a Memorandum of Agreement. It is intended to give the Council the flexibility to provide comments even where it has agreed to sign an MOA. Such comments might elaborate upon particular matters or provide suggestions to Federal agencies for future undertakings.

Section 800.7(c). This section gives the Council 45 days to provide its comments to the head of the agency for a response by the agency head. When submitting its comments, the Council will also provide the comments to the Federal Preservation Officer, among others, for information purposes.

Section 800.7(c)(4). This section specifies what it means to "document the agency head's decision" as required by section 110(l) when the Council issues its comment to the agency head.

Section 800.8. This major section guides how Federal agencies can coordinate the section 106 process with NEPA compliance. It is intended to allow compliance with section 106 to be incorporated into the NEPA documentation process while preserving the legal requirements of each statute.

Section 800.8(a)(1). This section encourages agencies to coordinate NEPA and section 106 compliance early in the planning process. It emphasizes that impacts on historic properties should be considered when an agency makes evalua-

tions of its NEPA obligations, but makes clear that an adverse effect [*77722] finding does not automatically trigger preparation of an EIS.

Section 800.8(a)(2). This section encourages consulting parties in the section 106 process to be prepared to consult with the Agency Official early in the NEPA process.

Section 800.8(a)(3). This section encourages agencies to include historic preservation issues in the development of various NEPA assessments and documents. This is essential for effective coordination between the two processes. It is intended to discourage agencies from postponing consideration of historic properties under NEPA until later initiation of the section 106 process.

Section 800.8(b). This section notes that a project, activity or program that falls within a NEPA categorical exclusion may still require section 106 review. An exclusion from NEPA does not necessarily mean that section 106 does not apply.

Section 800.8(c). This section offers Federal agencies an opportunity for major procedural streamlining when NEPA and section 106 both apply to a project. It allows the agency, when specific standards are met, to substitute preparation of an EA or an EIS for the specific steps of the section 106 process set out in these regulations.

Section 800.8(c)(1). This section lists the standards that must be adhered to when developing NEPA documents that are intended to incorporate 106 compliance. They are intended to ensure that the objectives of the section 106 process are being met even though the specific steps of the process are not being followed.

Section 800.8(c)(2). This section provides for Council and consulting party review of the agency's environmental document within NEPA's public comment review time frame. Consulting parties and the Council may object prior to or within this time frame to adequacy of the document.

Section 800.8(c)(3). If there is an objection to the NEPA document, the Council has 30 days to state whether or not it agrees with the objection. If the Council agrees with the objection, the Agency Official must complete the section 106 process through development of a Memorandum of Agreement or obtaining formal Council comment (§ 800.6-7). If it does not, then the Agency Official can complete its review under § 800.8.

Section 800.8(c)(4). This subsection explains how Agency Officials using NEPA coordination must finalize their section 106 compliance for those cases where an adverse effect is found. The Agency must document the proposed mitigation measures. A binding commitment with the proposed measures must be adopted. In the case of a FONSI, the binding commitment must be in the form of an MOA, drafted in accordance with § 800.6(c). Although the regulations do not send Agency Officials back to § 800.6(b) (regarding consultation towards an MOA), Agency Officials are reminded of the standards they must still follow under § 800.8(c)(1), and specifically the mitigation measures' consultation under § 800.8(c)(1)(v). In the case of an EIS, although a Memorandum of Agreement under § 800.6(c) is not required, an appropriate binding commitment must still be adopted. Finally, the subsection also clarifies the Agency Official's obligation to ensure that its approval of the undertaking is conditioned accordingly.

Section 800.8(c)(5). This section requires Federal agencies to supplement their NEPA documents or abide by §§ 800.3 through 800.6 in the event of a change in the proposed undertaking that alters the undertaking's impact on historic properties.

Section 800.9. This section delineates the methods the Council will use to oversee the operation of the section 106 process. The Council draws upon its general advisory powers and specific provisions of the NHPA to conduct these actions.

Section 800.9(a). This section emphasizes the right of the Council to provide advice at any time in the process on matters related to the section 106 process.

Section 800.9(b). A foreclosure means that an agency has gone forward with an undertaking to such an extent that the Council can not provide meaningful comments. A finding of foreclosure by the Council means that the Council has determined that the Federal agency has not fulfilled its section 106 responsibilities with regard to the undertaking. Such a finding does not trigger any specific action, but represents the opinion of the Council as the agency charged by statute with issuing the regulations that implement section 106.

Section 800.9(c). This section reiterates the requirements of section 110(k) of the Act added in 1992. It also provides a process by which the Council will comment if the Federal agency decides that circumstances may justify grant-

ing the assistance. If after considering the comments, the Federal agency does decide to grant the assistance, then the Federal agency must comply with section 106 for any historic properties that still may be affected. This does not require duplication of consultation that may have already taken place with the Council in the course of addressing 110(k), but is intended to ensure that the agency has meaningful consultation with the Council as to mitigating adverse effects if the agency decides to proceed with approving the undertaking.

Section 800.9(d). As the Council reduces its involvement in routine cases, it will be focusing its efforts more and more on agency programs and overall compliance with the section 106 process. The NHPA authorizes the Council to obtain information from Federal agencies and make recommendations on improving operation of the section 106 process. If the Council finds that an agency or a SHPO/THPO has not carried out its section 106 responsibilities properly, it may enter the section 106 process on an individual case basis to make improvement. The Council may also review agency operations and performance and make specific recommendations for improvement under section 202(a)(6) of the Act.

Section 800.10. This section provides a process for how Federal agencies must afford the Council a reasonable opportunity to comment on historic landmarks. It is largely unchanged from the process under previous regulations.

Section 800.11. This section sets forth the requirements for documentation at various steps in the section 106 process. It makes documentation requirements clearer and promotes agency use of documentation prepared for other planning requirements.

Section 800.11(a). The section allows for the phasing of documentation requirements when an agency is conducting phased identification and evaluation. The Council can advise on the resolution of disputes over adherence to documentation standards. However, the ultimate responsibility for compiling adequate documentation rests with the agency. During the consideration of any disputes over documentation, the process is not formally suspended. However, agencies should resolve significant disputes before going forward too far in the section 106 process in order to avoid subsequent delays.

Section 800.11(b). This section allows for the use of documents prepared for NEPA or other agency planning processes to fulfill this provision as long as those documents meet the standards in this section.

Section 800.11(c). This section is intended to protect the rights of private property owners with regard to proprietary information, and Indian [*77723] tribes and Native Hawaiian organizations with regard to properties to which they attach religious and cultural significance. This section emphasizes that the regulations are subject to any other Federal statutes which protect certain kinds of information from full public disclosure. The role of the Secretary and the process of consultation with the Council are based on the statutory requirements of section 304 of the Act.

Section 800.11(d)-(f). These sections specify the documentation standards for various findings or actions in the section 106 process. They are incrementally more detailed as the historic preservation issues become more substantial or complex. Each is intended to provide basic information so that a third-party reviewer can understand the basis for an agency's finding or proposed decision.

Section 800.12. This section deals with emergency situations and generally follows the approach of previous regulations.

Section 800.12(a). This section encourages Federal agencies to develop procedures describing how the Federal agency will take into account historic properties during certain emergency operations, including imminent threats to life or property. The nature of the consultation required in developing such procedures will vary, depending upon the extent of actions covered by the procedures. The procedures must be approved by the Council if they are to substitute for Subpart B.

Section 800.12(b). If there are no agency procedures for taking historic properties into account during emergencies, then the Federal agency may either follow a previously-developed Programmatic Agreement or notify the Council, SHPO/THPO and, where appropriate, an Indian tribe or Native Hawaiian organization concerned with potentially affected resources. If possible, the Federal agency should provide these parties 7 days to comment.

Section 800.12(c). This section permits a local government that has assumed section 106 responsibilities to use the provisions of § 800.12(a) and (b). However, if the Council or an SHPO/THPO objects, the local government must follow the normal section 106 process.

Section 800.12(d). A Federal agency may use the provisions in § 800.12 only for 30 days after an emergency or disaster has been declared, unless an extension is sought.

Section 800.13. This section deals with resources discovered after section 106 review has been completed.

Section 800.13(a). This section emphasizes the utility of developing Programmatic Agreements to deal with discoveries of historic properties which may occur during implementation of an undertaking. If there is no Programmatic Agreement to deal with discoveries, and the Agency Official determines that other historic properties are likely to be discovered, then a plan for how discoveries will be addressed must be included in a no adverse effect finding or a Memorandum of Agreement.

Section 800.13(b)(1). This section states the procedures that must be followed when construction has not yet occurred or an undertaking has not yet been approved. Because a Federal agency has more flexibility at this stage, adherence to the consultative process as set forth in § 800.6 is appropriate.

Section 800.13(b)(2). This section provides that where an archeological site has been discovered and where the Agency Official, SHPO/THPO and any appropriate Indian tribe or Native Hawaiian organization agree that it is of value solely for the data that it contains, the Agency Official can comply with the Archeological and Historic Preservation Act instead of the procedures in this subpart.

Section 800.13(b)(3). This section sets forth the procedures that must be followed when the undertaking has been approved and construction has commenced. Development of actions to resolve adverse effects and notification to the SHPO/THPO and the Council within 48 hours of the discovery are required. Comments from those parties are encouraged and the agency must report the actions it ended up taking to deal with the discovery.

Section 800.13(c). This section allows an agency to make an expedited field judgment regarding eligibility of properties discovered during construction.

Subpart C--Program Alternatives

Section 800.14. This section lays out a variety of alternative methods for Federal agencies to meet their section 106 obligations. They allow agencies to tailor the section 106 process to their needs.

Section 800.14(a). Alternate procedures are a major streamlining measure that allows tailoring of the section 106 process to Agency programs and decisionmaking processes. The procedures would substitute in whole or in part for the Council's section 106 regulations. As procedures, they would include formal Agency regulations, but would also include departmental or Agency procedures that do not go through the formal rulemaking process. Procedures must be developed in consultation with various parties as set forth in the regulations. The public must have an opportunity to comment on Alternate procedures. If the Council determines that they are consistent with its regulations, the alternate procedures may substitute for the Council's regulations. In reviewing alternate procedures for consistency, the Council will not require detailed adherence to every specific step of the process found under the Council's regulations. The Council, however, will look for procedures that afford historic properties consideration equivalent to that afforded by the Council's regulations and that meet the requirements of section 110(a)(2)(E) of the Act. If an Indian tribe has substituted its procedures for the Council's regulations pursuant to section 101(d)(5) of the NHPA, then the Federal agency must follow the agreement with the Council and the tribe's substitute regulations for undertakings on tribal lands.

Section 800.14(b). This section retains the concept of Programmatic Agreements. The circumstances under which a Programmatic Agreement is appropriate are specified. The section places Programmatic Agreements into two general categories: those covering agency programs and those covering complex or multiple undertakings. The section on Agency programs makes clear that the President of NCSHPO must sign a nationwide agreement when NCSHPO has participated in the consultation. If a Programmatic Agreement concerns a particular region, then the signature of the affected SHPOs/THPOs is required. An individual SHPO/THPO can terminate its participation in a regional Programmatic Agreement, but the agreement will remain in effect for the other states in the region. Only NCSHPO can terminate a nationwide Programmatic Agreement on behalf of the individual SHPOs. Language is included to recognize tribal sovereignty while providing flexibility to Federal agencies and tribes when developing Programmatic Agreements. While it does n W prohibit the other parties from executing a Programmatic Agreement, the language does limit the effect of the agreement to non-tribal lands unless the tribe executes it. However, the language also authorizes multiple Indian tribes to designate a representative tribe or tribal organization to participate in consultation and sign a Programmatic Agreement on their behalf. Requirements for public involvement and notice are included. The section on

complex or multiple undertakings ties [*77724] back to § 800.6 for the process of creating such programmatic agreements.

Section 800.14(c). Exemptions are intended to remove from section 106 compliance those undertakings that have foreseeable effects on historic properties which are likely to be minimal. Section 214 of the NHPA gives the Council the authority to allow for such exemptions. This section sets forth the criteria, drawn from the statute, for exemptions and a process for obtaining (and terminating) an exemption.

Section 800.14(d). Standard treatments provide a streamlined process by which the Council can establish certain acceptable practices for dealing with a category of undertakings, effects, historic properties, or treatment options. A standard treatment may modify the application of the normal section 106 process under certain circumstances or simplify the steps or requirements of the regulations. This section sets forth the process for establishing a standard treatment and terminating it.

Section 800.14(e). Program comments are intended to give the Council the flexibility to issue comments on a Federal program or class of undertakings rather than comment on such undertakings on a case-by-case basis. This section sets forth the process for issuing such comments and withdrawing them. The Federal agency is obligated to consider, but not necessarily follow, the Council's comments. If it does not, the Council may withdraw the comment, in which case the agency continues to comply with section 106 on a case-by-case basis.

Section 800.14(f). The requirement for consultation program alternatives with Indian tribes and Native Hawaiian organizations is provided for in this section. It is an overlay on each of the Federal program alternatives set forth in § 800.14(a)-(e). It provides for government-to-government consultation with Indian tribes.

Section 800.15. Tribal, State and Local Program Alternatives. This section is presently reserved for future use. The Council will proceed with the review of tribal applications for substitution of tribal regulations for the Council's section 106 regulations on tribal lands, pursuant to section 101(d)(5) of the Act, on the basis of informal procedures. With regard to State agreements, the Council will keep in effect any currently valid State agreements until revised procedures for State agreements take effect or until the agreement is otherwise terminated.

Section 800.16. Definitions. This section includes new definitions to respond to identified needs for clarification and to reflect statutory amendments.

The term "Agency" is defined for ease of reference. It tracks the statutory definition in the NHPA.

The definition of "approval of the expenditure of funds" clarifies the intent of this statutory language as it appears in section 106 of the NHPA. This definition addresses the timing of section 106 compliance. A Federal agency must take into account the effects of its actions and provide the Council a reasonable opportunity to comment before the Agency decides to authorize funds, not just before the release of those funds. The intent of this provision is to emphasize the necessitate for compliance with section 106 early in the decision making process.

The definition of "area of potential effects" acknowledges that the determination of the area potential effects often depends on the nature and scale of the undertaking and the associated effects.

The definition of "comment" makes it clear that the term refers to the formal comments of the Council members.

The definition of "consultation" describes the nature and goals of this critical aspect of the section 106 review process.

The term "day" was defined to clarify the running of time periods.

The term "effect" is defined because, even though the "no effect" step is not in the rule, the concept of an undertaking's effect is still a part of the "historic properties affected" determination.

"Foreclosure" is a term that has always been a part of the section 106 process. The term describes the finding that is made by the Council when an Agency action precludes the Council from its reasonable opportunity to comment on an undertaking.

The term "head of the Agency" is defined in light of the 1992 amendments in section 110(l) that require that the head of an Agency document a decision where a Memorandum of Agreement has not been reached for an undertaking.

"Indian tribe" is defined exactly as in section 301(4) of the NHPA.

"Native Hawaiian organization" is defined exactly as in section 301(17) of the NHPA.

"Tribal Historic Preservation Officer" is the tribal official who has formally assumed the SHPO's responsibilities under section 101(d)(2) of the NHPA.

"Tribal lands" is defined exactly as in section 301(14) of the NHPA.

"Undertaking" is defined exactly as in section 301(7) of the statute. The Agency Official is responsible, in accordance with § 800.3(a), for making the determination as to whether a proposed Federal action is an undertaking. As appropriate, an agency should examine the nature of its Federal involvement taking into consideration factors such as the degree of Federal agency control or discretion; the type of Federal involvement or link to the action; and whether or not the action could move forward without Federal involvement. An agency should seek the advice of the Council when uncertain about whether or not its action falls within the definition of an undertaking. The 1986 regulatory definition of undertaking included new and continuing projects, activities, or programs and any of their elements not previously considered under section 106. It is intended that the new definition includes such aspects of a project, activity, or program as undertakings.

Appendix A. Criteria for Council Involvement in Reviewing Individual section 106 Cases

This appendix sets forth the criteria that will guide Council decisions to enter certain section 106 cases. As § 800.2(b)(1) states, the Council will document that the criteria have been met and notify the parties to the section 106 process as required. Council involvement in section 106 cases is not automatic once a criterion has been met. The Council retains discretion as to whether or not to enter such a case. Likewise, it is not essential that all criteria be met. The point of the criteria is to ensure that the Council has made a thoughtful decision to enter the section 106 process and to give agencies, SHPOs/THPOs and other section 106 participants a clear understanding of the kind of cases that warrant Council involvement.

V. Impact Analysis

The Regulatory Flexibility Act

The Council certifies that the final rule will not have a significant economic impact on a substantial number of small entities. Although comments on the proposed rule questioned the validity of such certification, the rule in its proposed and final versions imposes mandatory responsibilities on only Federal agencies. As set forth in section 106 of the NHPA, the duties to take into account the effect of an undertaking on historic resources and to afford the Council a reasonable opportunity to comment on that undertaking are Federal agency duties. Indirect effects on small entities, if any, created in the [*77725] course of a Federal agency's compliance with section 106 of the NHPA, must be considered and evaluated by that Federal agency.

The Paperwork Reduction Act

The final regulations do not impose reporting or recordkeeping requirements or the collection of information as defined in the Paperwork Reduction Act.

The National Environmental Policy Act

In accordance with 36 CFR part 805, the Council initiated the NEPA compliance process for the Council's regulations implementing section 106 of the NHPA prior to publication of the proposed rule in the **Federal Register** on September 13, 1996. On July 11, 2000, through a notice of availability on the **Federal Register** *(65 FR 42850)*, the Council sought public comment on its Environmental Assessment and preliminary Finding of No Significant Impact. The Council has considered such comments, and has confirmed its finding of no significant impact on the human environment. A notice of availability of the Environmental Assessment and Finding of No Significant Impact has been published in the **Federal Register**.

Executive Orders 12866 and 12875

The Council is exempt from compliance with Executive Order 12866 pursuant to implementing guidance issued by the Office of Management and Budget's Office of Information and Regulatory Affairs in a memorandum dated October 12, 1993. The Council also is exempt from the documentation requirements of Executive Order 12875 pursuant to im-

plementing guidance issued by the same OMB office in a memorandum dated January 11, 1994. The rule does not mandate State, local, or tribal governments to participate in the section 106 process. Instead, State, local, and tribal governments may decline to participate. State Historic Preservation Officers do advise and assist Federal agencies, as appropriate, as part of their duties under section 101(b)(3)(E) of the NHPA, as a condition of their Federal grant assistance. In addition, in accordance with Executive Order 12875, the rule includes several flexible approaches to consideration of historic properties in Federal agency decision making, such as those under § 800.14 of the rule. The rule promotes flexibility and cost effective compliance by providing for alternate procedures, categorical exemptions, standard treatments, program comments, and programmatic agreements.

The Unfunded Mandates Reform Act of 1995

The final rule implementing section 106 of the NHPA does not impose annual costs of $ 100 million or more, will not significantly or uniquely affect small governments, and is not a significant Federal intergovernmental mandate. The Council thus has no obligations under sections 202, 203, 204 and 205 of the Unfunded Mandates Reform Act.

Executive Order 12898

The final rule implementing section 106 of the NHPA does not cause adverse human health or environmental effects, but, instead, seeks to avoid adverse effects on historic properties throughout the United States. The participation and consultation process established by this rule seeks to ensure public participation-including by minority and low-income populations and communities-by those whose cultural heritage, or whose interest in historic properties, may be affected by proposed Federal undertakings. The section 106 process is a means of access for minority and low-income populations to participate in Federal decisions or actions that may affect such resources as historically significant neighborhoods, buildings, and traditional cultural properties. The Council considers environmental justice issues in reviewing analysis of alternatives and mitigation options particularly when section 106 compliance is coordinated with NEPA compliance. Guidance and training is being developed to assist public understanding and use of this rule.

Memorandum Concerning Government-to-Government Relations With Native American Tribal Governments

The Council has fully complied with this Memorandum. A Native American/Native Hawaiian representative has served on the Council. As better detailed in the preamble to the rule adopted in 1999, the Council has consulted at length with Tribes in developing the substance of what became the proposed rule in this rulemaking. The rule enhances the opportunity for Native American involvement in the section 106 process and clarifies the obligation of Federal agencies to consult with Native Americans. The rule also enhances the Government-to-Government intentions of the memorandum.

Submission to Congress and the Comptroller General

The Congressional Review Act, *5 U.S.C. 801 et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The Council will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This rule is not a "major rule" as defined by *5 U.S.C. 804*(2). This rule will be effective January 11, 2001.

List of Subjects in 36 CFR Part 800

Administrative practice and procedure, Historic preservation, Indians, Intergovernmental relations.

For the reasons discussed in the preamble, the Advisory Council on Historic Preservation amends 36 CFR chapter VIII by revising part 800 to read as follows:

PART 800--PROTECTION OF HISTORIC PROPERTIES

Subpart A--Purposes and Participants

Sec.

800.1 Purposes.

800.2 Participants in the Section 106 process.

Subpart B--The Section 106 Process

800.3 Initiation of the section 106 process.

800.4 Identification of historic properties.

800.5 Assessment of adverse effects.

800.6 Resolution of adverse effects.

800.7 Failure to resolve adverse effects.

800.8 Coordination with the National Environmental Policy Act.

800.9 Council review of Section 106 compliance.

800.10 Special requirements for protecting National Historic Landmarks.

800.11 Documentation standards.

800.12 Emergency situations.

800.13 Post-review discoveries.

Subpart C--Program Alternatives

800.14 Federal agency program alternatives.

800.15 Tribal, State, and local program alternatives. [Reserved]

800.16 Definitions.

Appendix A to Part 800-Criteria for Council involvement in reviewing individual section 106 cases

Authority: *16 U.S.C. 470s.*

Subpart A--Purposes and Participants

§ 800.1 -- Purposes.

(a) *Purposes of the section 106 process.* Section 106 of the National Historic Preservation Act requires Federal agencies to take into account the effects of their undertakings on historic properties and afford the Council a [*77726] reasonable opportunity to comment on such undertakings. The procedures in this part define how Federal agencies meet these statutory responsibilities. The section 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning. The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.

(b) *Relation to other provisions of the act.* Section 106 is related to other provisions of the act designed to further the national policy of historic preservation. References to those provisions are included in this part to identify circumstances where they may affect actions taken to meet section 106 requirements. Such provisions may have their own im-

plementing regulations or guidelines and are not intended to be implemented by the procedures in this part except insofar as they relate to the section 106 process. Guidelines, policies, and procedures issued by other agencies, including the Secretary, have been cited in this part for ease of access and are not incorporated by reference.

(c) *Timing.* The agency official must complete the section 106 process "prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license." This does not prohibit agency official from conducting or authorizing nondestructive project planning activities before completing compliance with section 106, provided that such actions do not restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties. The agency official shall ensure that the section 106 process is initiated early in the undertaking's planning, so that a broad range of alternatives may be considered during the planning process for the undertaking.

§ 800.2 -- Participants in the Section 106 process.

(a) *Agency official.* It is the statutory obligation of the Federal agency to fulfill the requirements of section 106 and to ensure that an agency official with jurisdiction over an undertaking takes legal and financial responsibility for section 106 compliance in accordance with subpart B of this part. The agency official has approval authority for the undertaking and can commit the Federal agency to take appropriate action for a specific undertaking as a result of section 106 compliance. For the purposes of subpart C of this part, the agency official has the authority to commit the Federal agency to any obligation it may assume in the implementation of a program alternative. The agency official may be a State, local, or tribal government official who has been delegated legal responsibility for compliance with section 106 in accordance with Federal law.

(1) *Professional standards.* Section 112(a)(1)(A) of the act requires each Federal agency responsible for the protection of historic resources, including archeological resources, to ensure that all actions taken by employees or contractors of the agency shall meet professional standards under regulations developed by the Secretary.

(2) *Lead Federal agency.* If more than one Federal agency is involved in an undertaking, some or all the agencies may designate a lead Federal agency, which shall identify the appropriate official to serve as the agency official who shall act on their behalf, fulfilling their collective responsibilities under section 106. Those Federal agencies that do not designate a lead Federal agency remain individually responsible for their compliance with this part.

(3) *Use of contractors.* Consistent with applicable conflict of interest laws, the agency official may use the services of applicants, consultants, or designees to prepare information, analyses and recommendations under this part. The agency official remains legally responsible for all required findings and determinations. If a document or study is prepared by a non-Federal party, the agency official is responsible for ensuring that its content meets applicable standards and guidelines.

(4) *Consultation.* The agency official shall involve the consulting parties described in paragraph (c) of this section in findings and determinations made during the section 106 process. The agency official should plan consultations appropriate to the scale of the undertaking and the scope of Federal involvement and coordinated with other requirements of other statutes, as applicable, such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act, and agency-specific legislation. The Council encourages the agency official to use to the extent possible existing agency procedures and mechanisms to fulfill the consultation requirements of this part.

(b) *Council.* The Council issues regulations to implement section 106, provides guidance and advice on the application of the procedures in this part, and generally oversees the operation of the section 106 process. The Council also consults with and comments to agency officials on individual undertakings and programs that affect historic properties.

(1) *Council entry into the section 106 process.* When the Council determines that its involvement is necessary to ensure that the purposes of section 106 and the act are met, the Council may enter the section 106 process. Criteria guiding Council decisions to enter the section 106 process are found in appendix A to this part. The Council will document that the criteria have been met and notify the parties to the section 106 process as required by this part.

(2) *Council assistance.* Participants in the section 106 process may seek advice, guidance and assistance from the Council on the application of this part to specific undertakings, including the resolution of disagreements, whether or not the Council is formally involved in the review of the undertaking. If questions arise regarding the conduct of the section 106 process, participants are encouraged to obtain the Council's advice on completing the process.

(c) *Consulting parties.* The following parties have consultative roles in the section 106 process.

(1) *State historic preservation officer.*

(i) The State historic preservation officer (SHPO) reflects the interests of the State and its citizens in the preservation of their cultural heritage. In accordance with section 101(b)(3) of the act, the SHPO advises and assists Federal agencies in carrying out their section 106 responsibilities and cooperates with such agencies, local governments and organizations and individuals to ensure that historic properties are taking into consideration at all levels of planning and development.

(ii) If an Indian tribe has assumed the functions of the SHPO in the section 106 process for undertakings on tribal lands, the SHPO shall participate as a consulting party if the undertaking takes place on tribal lands but affects historic properties off tribal lands, if requested in accordance with § 800.3(c)(1), or if the Indian tribe agrees to include the SHPO pursuant to § 800.3(f)(3).

(2) *Indian tribes and Native Hawaiian organizations.*

(i) *Consultation on tribal lands.* [*77727]

(A) *Tribal historic preservation officer.* For a tribe that has assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the tribal historic preservation officer (THPO) appointed or designated in accordance with the act is the official representative for the purposes of section 106. The agency official shall consult with the THPO in lieu of the SHPO regarding undertakings occurring on or affecting historic properties on tribal lands.

(B) *Tribes that have not assumed SHPO functions.* When an Indian tribe has not assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the agency official shall consult with a representative designated by such Indian tribe in addition to the SHPO regarding undertakings occurring on or affecting historic properties on its tribal lands. Such Indian tribes have the same rights of consultation and concurrence that the THPOs are given throughout subpart B of this part, except that such consultations shall be in addition to and on the same basis as consultation with the SHPO.

(ii) *Consultation on historic properties of significance to Indian tribes and Native Hawaiian organizations.* Section 101(d)(6)(B) of the act requires the agency official to consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking. This requirement applies regardless of the location of the historic property. Such Indian tribe or Native Hawaiian organization shall be a consulting party.

(A) The agency official shall ensure that consultation in the section 106 process provides the Indian tribe or Native Hawaiian organization a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects. It is the responsibility of the agency official to make a reasonable and good faith effort to identify Indian tribes and Native Hawaiian organizations that shall be consulted in the section 106 process. Consultation should commence early in the planning process, in order to identify and discuss relevant preservation issues and resolve concerns about the confidentiality of information on historic properties.

(B) The Federal Government has a unique legal relationship with Indian tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions. Consultation with Indian tribes should be conducted in a sensitive manner respectful of tribal sovereignty. Nothing in this part alters, amends, repeals, interprets, or modifies tribal sovereignty, any treaty rights, or other rights of an Indian tribe, or preempts, modifies, or limits the exercise of any such rights.

(C) Consultation with an Indian tribe must recognize the government-to-government relationship between the Federal Government and Indian tribes. The agency official shall consult with representatives designated or identified by the tribal government or the governing body of a Native Hawaiian organization. Consultation with Indian tribes and Native Hawaiian organizations should be conducted in a manner sensitive to the concerns and needs of the Indian tribe or Native Hawaiian organization.

(D) When Indian tribes and Native Hawaiian organizations attach religious and cultural significance to historic properties off tribal lands, section 101(d)(6)(B) of the act requires Federal agencies to consult with such Indian tribes

and Native Hawaiian organizations in the section 106 process. Federal agencies should be aware that frequently historic properties of religious and cultural significance are located on ancestral, aboriginal, or ceded lands of Indian tribes and Native Hawaiian organizations and should consider that when complying with the procedures in this part.

(E) An Indian tribe or a Native Hawaiian organization may enter into an agreement with an agency official that specifies how they will carry out responsibilities under this part, including concerns over the confidentiality of information. An agreement may cover all aspects of tribal participation in the section 106 process, provided that no modification may be made in the roles of other parties to the section 106 process without their consent. An agreement may grant the Indian tribe or Native Hawaiian organization additional rights to participate or concur in agency decisions in the section 106 process beyond those specified in subpart B of this part. The agency official shall provide a copy of any such agreement to the Council and the appropriate SHPOs.

(F) An Indian tribe that has not assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act may notify the agency official in writing that it is waiving its rights under § 800.6(c)(1) to execute a memorandum of agreement.

(3) *Representatives of local governments.* A representative of a local government with jurisdiction over the area in which the effects of an undertaking may occur is entitled to participate as a consulting party. Under other provisions of Federal law, the local government may be authorized to act as the agency official for purposes of section 106.

(4) *Applicants for Federal assistance, permits, licenses, and other approvals.* An applicant for Federal assistance or for a Federal permit, license, or other approval is entitled to participate as a consulting party as defined in this part. The agency official may authorize an applicant or group of applicants t of apiate consultation with the SHPO/THPO and others, but remains legally responsible for all findings and determinations charged to the agency official. The agency official shall notify the SHPO/THPO when an applicant or group of applicants is so authorized. A Federal agency may authorize all applicants in a specific program pursuant to this section by providing notice to all SHPO/THPOs. Federal agencies that provide authorizations to applicants remain responsible for their government-to-government relationships with Indian tribes.

(5) *Additional consulting parties.* Certain individuals and organizations with a demonstrated interest in the undertaking may participate as consulting parties due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties.

(d) *The public.*

(1) *Nature of involvement.* The views of the public are essential to informed Federal decisionmaking in the section 106 process. The agency official shall seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, the likely interest of the public in the effects on historic properties, confidentiality concerns of private individuals and businesses, and the relationship of the Federal involvement to the undertaking.

(2) *Providing notice and information.* The agency official must, except where appropriate to protect confidentiality concerns of affected parties, provide the public with information about an undertaking and its effects on historic properties and seek public comment and input. Members of the public may [*77728] also provide views on their own initiative for the agency official to consider in decisionmaking.

(3) *Use of agency procedures.* The agency official may use the agency's procedures for public involvement under the National Environmental Policy Act or other program requirements in lieu of public involvement requirements in subpart B of this part, if they provide adequate opportunities for public involvement consistent with this subpart.

Subpart B--The section 106 Process

§ 800.3 -- Initiation of the section 106 process.

(a) *Establish undertaking.* The agency official shall determine whether the proposed Federal action is an undertaking as defined in § 800.16(y) and, if so, whether it is a type of activity that has the potential to cause effects on historic properties.

(1) *No potential to cause effects.* If the undertaking is a type of activity that does not have the potential to cause effects on historic properties, assuming such historic properties were present, the agency official has no further obligations under section 106 or this part.

(2) *Program alternatives.* If the review of the undertaking is governed by a Federal agency program alternative established under § 800.14 or a programmatic agreement in existence before January 11, 2001, the agency official shall follow the program alternative.

(b) *Coordinate with other reviews.* The agency official should coordinate the steps of the section 106 process, as appropriate, with the overall planning schedule for the undertaking and with any reviews required under other authorities such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act, and agency-specific legislation, such as section 4(f) of the Department of Transportation Act. Where consistent with the procedures in this subpart, the agency official may use information developed for other reviews under Federal, State, or tribal law to meet the requirements of section 106.

(c) *Identify the appropriate SHPO and/or THPO.* As part of its initial planning, the agency official shall determine the appropriate SHPO or SHPOs to be involved in the section 106 process. The agency official shall also determine whether the undertaking may occur on or affect historic properties on any tribal lands and, if so, whether a THPO has assumed the duties of the SHPO. The agency official shall then initiate consultation with the appropriate officer or officers.

(1) *Tribal assumption of SHPO responsibilities.* Where an Indian tribe has assumed the section 106 responsibilities of the SHPO on tribal lands pursuant to section 101(d)(2) of the act, consultation for undertakings occurring on tribal land or for effects on tribal land is with the THPO for the Indian tribe in lieu of the SHPO. Section 101(d)(2)(D)(iii) of the act authorizes owners of properties on tribal lands which are neither owned by a member of the tribe nor held in trust by the Secretary for the benefit of the tribe to request the SHPO to participate in the section 106 process in addition to the THPO.

(2) *Undertakings involving more than one State.* If more than one State is involved in an undertaking, the involved SHPOs may agree to designate a lead SHPO to act on their behalf in the section 106 process, including taking actions that would conclude the section 106 process under this subpart.

(3) *Conducting consultation.* The agency official should consult with the SHPO/THPO in a manner appropriate to the agency planning process for the undertaking and to the nature of the undertaking and its effects on historic properties.

(4) *Failure of the SHPO/THPO to respond.* If the SHPO/THPO fails to respond within 30 days of receipt of a request for review of a finding or determination, the agency official may either proceed to the next step in the process based on the finding or determination or consult with the Council in lieu of the SHPO/THPO. If the SHPO/THPO re-enters the Section 106 process, the agency official shall continue the consultation without being required to reconsider previous findings or determinations.

(d) *Consultation on tribal lands.* Where the Indian tribe has not assumed the responsibilities of the SHPO on tribal lands, consultation with the Indian tribe regarding undertakings occurring on such tribe's lands or effects on such tribal lands shall be in addition to and on the same basis as consultation with the SHPO. If the SHPO has withdrawn from the process, the agency official may complete the section 106 process with the Indian tribe and the Council, as appropriate. An Indian tribe may enter into an agreement with a SHPO or SHPOs specifying the SHPO's participation in the section 106 process for undertakings occurring on or affecting historic properties on tribal lands.

(e) *Plan to involve the public.* In consultation with the SHPO/THPO, the agency official shall plan for involving the public in the section 106 process. The agency official shall identify the appropriate points for seeking public input and for notifying the public of proposed actions, consistent with § 800.2(d).

(f) *Identify other consulting parties.* In consultation with the SHPO/THPO, the agency official shall identify any other parties entitled to be consulting parties and invite them to participate as such in the section 106 process. The agency official may invite others to participate as consulting parties as the section 106 process moves forward.

(1) *Involving local governments and applicants.* The agency official shall invite any local governments or applicants that are entitled to be consulting parties under § 800.2(c).

(2) *Involving Indian tribes and Native Hawaiian organizations.* The agency official shall make a reasonable and good faith effort to identify any Indian tribes or Native Hawaiian organizations that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties. Such Indian tribe or Native Hawaiian organization that requests in writing to be a consulting party shall be one.

(3) *Requests to be consulting parties.* The agency official shall consider all written requests of individuals and organizations to participate as consulting parties and, in consultation with the SHPO/THPO and any Indian tribe upon whose tribal lands an undertaking occurs or affects historic properties, determine which should be consulting parties.

(g) *Expediting consultation.* A consultation by the agency official with the SHPO/THPO and other consulting parties may address multiple steps in §§ 800.3 through 800.6 where the agency official and the SHPO/THPO agree it is appropriate as long as the consulting parties and the public have an adequate opportunity to express their views as provided in § 800.2(d).

§ 800.4 -- Identification of historic properties.

(a) *Determine scope of identification efforts.* In consultation with the SHPO/THPO, the agency official shall:

(1) Determine and document the area of potential effects, as defined in § 800.16(d);

(2) Review existing information on historic properties within the area of potential effects, including any data [*77729] concerning possible historic properties not yet identified;

(3) Seek information, as appropriate, from consulting parties, and other individuals and organizations likely to have knowledge of, or concerns with, historic properties in the area, and identify issues relating to the undertaking's potential effects on historic properties; and

(4) Gather information from any Indian tribe or Native Hawaiian organization identified pursuant to § 800.3(f) to assist in identifying properties, including those located off tribal lands, which may be of religious and cultural significance to them and may be eligible for the National Register, recognizing that an Indian tribe or Native Hawaiian organization may be reluctant to divulge specific information regarding the location, nature, and activities associated with such sites. The agency official should address concerns raised about confidentiality pursuant to § 800.11(c).

(b) *Identify historic properties.* Based on the information gathered under paragraph (a) of this section, and in consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to properties within the area of potential effects, the agency official shall take the steps necessary to identify historic properties within the area of potential effects.

(1) *Level of effort.* The agency official shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey. The agency official shall take into account past planning, research and studies, the magnitude and nature of the undertaking and the degree of Federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects. The Secretary's standards and guidelines for identification provide guidance on this subject. The agency official should also consider other applicable professional, State, tribal, and local laws, standards, and guidelines. The agency official shall take into account any confidentiality concerns raised by Indian tribes or Native Hawaiian organizations during the identification process.

(2) *Phased identification and evaluation.* Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process to conduct identification and evaluation efforts. The agency official may also defer final identification and evaluation of historic properties if it is specifically provided for in a memorandum of agreement executed pursuant to § 800.6, a programmatic agreement executed pursuant to § 800.14(b), or the documents used by an agency official to comply with the National Environmental Policy Act pursuant to § 800.8. The process should establish the likely presence of historic properties within the area of potential effects for each alternative or inaccessible area through background research, consultation and an appropriate level of field investigation, taking into account the number of alternatives under consideration, the magnitude of the undertaking and its likely effects, and the views of the SHPO/THPO and any other consulting parties. As specific aspects or locations of an alternative are refined or access is gained, the agency official shall proceed with the identification and evaluation of historic properties in accordance with paragraphs (b)(1) and (c) of this section.

(c) *Evaluate historic significance.*

(1) *Apply National Register criteria.* In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified properties and guided by the Secretary's standards and guidelines for evaluation, the agency official shall apply the National Register criteria (36 CFR part 63) to properties identified within the area of potential effects that have not been previously evaluated for National Register eligibility. The passage of time, changing perceptions of significance, or incomplete prior evaluations may require the agency official to reevaluate properties previously determined eligible or ineligible. The agency official shall acknowledge that Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.

(2) *Determine whether a property is eligible.* If the agency official determines any of the National Register criteria are met and the SHPO/THPO agrees, the property shall be considered eligible for the National Register for section 106 purposes. If the agency official determines the criteria are not met and the SHPO/THPO agrees, the property shall be considered not eligible. If the agency official and the SHPO/THPO do not agree, or if the Council or the Secretary so request, the agency official shall obtain a determination of eligibility from the Secretary pursuant to 36 CFR part 63. If an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to a property off tribal lands does not agree, it may ask the Council to request the agency official to obtain a determination of eligibility.

(d) *Results of identification and evaluation.*

(1) *No historic properties affected.* If the agency official finds that either there are no historic properties present or there are historic properties present but the undertaking will have no effect upon them as defined in § 800.16(i), the agency official shall provide documentation of this finding, as set forth in § 800.11(d), to the SHPO/THPO. The agency official shall notify all consulting parties, including Indian tribes and Native Hawaiian organizations, and make the documentation available for public inspection prior to approving the undertaking. If the SHPO/THPO, or the Council if it has entered the section 106 process, does not object within 30 days of receipt of an adequately documented finding, the agency official's responsibilities under section 106 are fulfilled.

(2) *Historic properties affected.* If the agency official finds that there are historic properties which may be affected by the undertaking or the SHPO/THPO or the Council objects to the agency official's finding under paragraph (d)(1) of this section, the agency official shall notify all consulting parties, including Indian tribes or Native Hawaiian organizations, invite their views on the effects and assess adverse effects, if any, in accordance with § 800.5.

§ 800.5 -- Assessment of adverse effects.

(a) *Apply criteria of adverse effect.* In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified historic properties, the agency official shall apply the criteria of adverse effect to historic properties within the area of potential effects. The agency official shall consider any views concerning such effects which have been provided by consulting parties and the public.

(1) *Criteria of adverse effect.* An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all [*77730] qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.

(2) *Examples of adverse effects.* Adverse effects on historic properties include, but are not limited to:

(i) Physical destruction of or damage to all or part of the property;

(ii) Alteration of a property, including restoration, rehabilitation, repair, maintenance, stabilization, hazardous material remediation, and provision of handicapped access, that is not consistent with the Secretary's standards for the treatment of historic properties (36 CFR part 68) and applicable guidelines;

(iii) Removal of the property from its historic location;

(iv) Change of the character of the property's use or of physical features within the property's setting that contribute to its historic significance;

(v) Introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features;

(vi) Neglect of a property which causes its deterioration, except where such neglect and deterioration are recognized qualities of a property of religious and cultural significance to an Indian tribe or Native Hawaiian organization; and

(vii) Transfer, lease, or sale of property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance.

(3) *Phased application of criteria.* Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process in applying the criteria of adverse effect consistent with phased identification and evaluation efforts conducted pursuant to § 800.4(b)(2).

(b) *Finding of no adverse effect.* The agency official, in consultation with the SHPO/THPO, may propose a finding of no adverse effect when the undertaking's effects do not meet the criteria of paragraph (a)(1) of this section or the undertaking is modified or conditions are imposed, such as the subsequent review of plans for rehabilitation by the SHPO/THPO to ensure consistency with the Secretary's standards for the treatment of historic properties (36 CFR part 68) and applicable guidelines, to avoid adverse effects.

(c) *Consulting party review.* If the agency official proposes a finding of no adverse effect, the agency official shall notify all consulting parties of the finding and provide them with the documentation specified in § 800.11(e). The SHPO/THPO shall have 30 days from receipt to review the finding.

(1) *Agreement with finding.* Unless the Council is reviewing the finding pursuant to § 800.5(c)(3), the agency official may proceed if the SHPO/THPO agrees with the finding. The agency official shall carry out the undertaking in accordance with § 800.5(d)(1). Failure of the SHPO/THPO to respond within 30 days from receipt of the finding shall be considered agreement of the SHPO/THPO with the finding.

(2) *Disagreement with finding.*

(i) If the SHPO/THPO or any consulting party disagrees within the 30-day review period, it shall specify the reasons for disagreeing with the finding. The agency official shall either consult with the party to resolve the disagreement, or request the Council to review the finding pursuant to paragraph (c)(3) of this section.

(ii) The agency official should seek the concurrence of any Indian tribe or Native Hawaiian organization that has made known to the agency official that it attaches religious and cultural significance to a historic property subject to the finding. If such Indian tribe or Native Hawaiian organization disagrees with the finding, it may within the 30-day review period specify the reasons for disagreeing with the findingiod spequest the Council to review the finding pursuant to paragraph (c)(3) of this section.

(iii) If the Council on its own initiative so requests within the 30-day review period, the agency official shall submit the finding, along with the documentation specified in § 800.11(e), for review pursuant to paragraph (c)(3) of this section. A Council decision to make such a request shall be guided by the criteria in appendix A to this part.

(3) *Council review of findings.* When a finding is submitted to the Council pursuant to paragraph (c)(2) of this section, the agency official shall include the documentation specified in § 800.11(e). The Council shall review the finding and notify the agency official of its determination as to whether the adverse effect criteria have been correctly applied within 15 days of receiving the documented finding from the agency official. The Council shall specify the basis for its determination. The agency official shall proceed in accordance with the Council's determination. If the Council does not respond within 15 days of receipt of the finding, the agency official may assume concurrence with the agency official's findings and proceed accordingly.

(d) *Results of assessment.*

(1) *No adverse effect.* The agency official shall maintain a record of the finding and provide information on the finding to the public on request, consistent with the confidentiality provisions of § 800.11(c). Implementation of the undertaking in accordance with the finding as documented fulfills the agency official's responsibilities under section 106 and this part. If the agency official will not conduct the undertaking as proposed in the finding, the agency official shall reopen consultation under paragraph (a) of this section.

(2) *Adverse effect.* If an adverse effect is found, the agency official shall consult further to resolve the adverse effect pursuant to § 800.6.

§ 800.6 -- Resolution of adverse effects.

(a) *Continue consultation.* The agency official shall consult with the SHPO/THPO and other consulting parties, including Indian tribes and Native Hawaiian organizations, to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties.

(1) *Notify the Council and determine Council participation.* The agency official shall notify the Council of the adverse effect finding by providing the documentation specified in § 800.11(e).

(i) The notice shall invite the Council to participate in the consultation when:

(A) The agency official wants the Council to participate;

(B) The undertaking has an adverse effect upon a National Historic Landmark; or

(C) A programmatic agreement under § 800.14(b) will be prepared;

(ii) The SHPO/THPO, an Indian tribe or Native Hawaiian organization, or any other consulting party may at any time independently request the Council to participate in the consultation.

(iii) The Council shall advise the agency official and all consulting parties whether it will participate within 15 days of receipt of notice or other request. Prior to entering the process, the Council shall provide written notice to the agency official and the consulting parties that its decision to participate meets the criteria set forth in appendix A to this part. The Council shall also advise the head of the agency of its decision to enter the process. Consultation with Council participation [*77731] is conducted in accordance with paragraph (b)(2) of this section.

(iv) If the Council does not join the consultation, the agency official shall proceed with consultation in accordance with paragraph (b)(1) of this section.

(2) *Involve consulting parties.* In addition to the consulting parties identified under § 800.3(f), the agency official, the SHPO/THPO and the Council, if participating, may agree to invite other individuals or organizations to become consulting parties. The agency official shall invite any individual or organization that will assume a specific role or responsibility in a memorandum of agreement to participate as a consulting party.

(3) *Provide documentation.* The agency official shall provide to all consulting parties the documentation specified in § 800.11(e), subject to the confidentiality provisions of § 800.11(c), and such other documentation as may be developed during the consultation to resolve adverse effects.

(4) *Involve the public.* The agency official shall make information available to the public, including the documentation specified in § 800.11(e), subject to the confidentiality provisions of § 800.11(c). The agency official shall provide an opportunity for members of the public to express their views on resolving adverse effects of the undertaking. The agency official should use appropriate mechanisms, taking into account the magnitude of the undertaking and the nature of its effects upon historic properties, the likely effects on historic properties, and the relationship of the Federal involvement to the undertaking to ensure that the public's views are considered in the consultation. The agency official should also consider the extent of notice and information concerning historic preservation issues afforded the public at earlier steps in the section 106 process to determine the appropriate level of public involvement when resolving adverse effects so that the standards of § 800.2(d) are met.

(5) *Restrictions on disclosure of information.* Section 304 of the act and other authorities may limit the disclosure of information under paragraphs (a)(3) and (a)(4) of this section. If an Indian tribe or Native Hawaiian organization objects to the disclosure of information or if the agency official believes that there are other reasons to withhold information, the agency official shall comply with § 800.11(c) regarding the disclosure of such information.

(b) *Resolve adverse effects.*

(1) *Resolution without the Council.*

(i) The agency official shall consult with the SHPO/THPO and other consulting parties to seek ways to avoid, minimize or mitigate the adverse effects.

(ii) The agency official may use standard treatments established by the Council under § 800.14(d) as a basis for a memorandum of agreement.

(iii) If the Council decides to join the consultation, the agency official shall follow paragraph (b)(2) of this section.

(iv) If the agency official and the SHPO/THPO agree on how the adverse effects will be resolved, they shall execute a memorandum of agreement. The agency official must submit a copy of the executed memorandum of agreement, along with the documentation specified in § 800.11(f), to the Council prior to approving the undertaking in order to meet the requirements of section 106 and this subpart.

(v) If the agency official, and the SHPO/THPO fail to agree on the terms of a memorandum of agreement, the agency official shall request the Council to join the consultation and provide the Council with the documentation set forth in § 800.11(g). If the Council decides to join the consultation, the agency official shall proceed in accordance with paragraph (b)(2) of this section. If the Council decides not to join the consultation, the Council will notify the agency and proceed to comment in accordance with § 800.7(c).

(2) *Resolution with Council participation.* If the Council decides to participate in the consultation, the agency official shall consult with the SHPO/THPO, the Council, and other consulting parties, including Indian tribes and Native Hawaiian organizations under § 800.2(c)(3), to seek ways to avoid, minimize or mitigate the adverse effects. If the agency official, the SHPO/THPO, and the Council agree on how the adverse effects will be resolved, they shall execute a memorandum of agreement.

(c) *Memorandum of agreement.* A memorandum of agreement executed and implemented pursuant to this section evidences the agency official's compliance with section 106 and this part and shall govern the undertaking and all of its parts. The agency official shall ensure that the undertaking is carried out in accordance with the memorandum of agreement.

(1) *Signatories.* The signatories have sole authority to execute, amend or terminate the agreement in accordance with this subpart.

(i) The agency official and the SHPO/THPO are the signatories to a memorandum of agreement executed pursuant to paragraph (b)(1) of this section.

(ii) The agency official, the SHPO/THPO, and the Council are the signatories to a memorandum of agreement executed pursuant to paragraph (b)(2) of this section.

(iii) The agency official and the Council are signatories to a memorandum of agreement executed pursuant to § 800.7(a)(2).

(2) *Invited signatories.*

(i) The agency official may invite additional parties to be signatories to a memorandum of agreement. Any such party that signs the memorandum of agreement shall have the same rights with regard to seeking amendment or termination of the memorandum of agreement as other signatories.

(ii) The agency official may invite an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties located off tribal lands to be a signatory to a memorandum of agreement concerning such properties.

(iii) The agency official should invite any party that assumes a responsibility under a memorandum of agreement to be a signatory.

(iv) The refusal of any party invited to become a signatory to a memorandum of agreement pursuant to paragraph (c)(2) of this section does not invalidate the memorandum of agreement.

(3) *Concurrence by others.* The agency official may invite all consulting parties to concur in the memorandum of agreement. The signatories may agree to invite others to concur. The refusal of any party invited to concur in the memorandum of agreement does not invalidate the memorandum of agreement.

(4) *Reports on implementation.* Where the signatories agree it is appropriate, a memorandum of agreement shall include a provision for monitoring and reporting on its implementation.

(5) *Duration.* A memorandum of agreement shall include provisions for termination and for reconsideration of terms if the undertaking has not been implemented within a specified time.

(6) *Discoveries.* Where the signatories agree it is appropriate, a memorandum of agreement shall include provisions to deal with the subsequent discovery or identification of additional historic properties affected by the undertaking.

(7) *Amendments.* The signatories to a memorandum of agreement may amend it. If the Council was not a signatory to the original agreement and the signatories execute an amended agreement, the agency official shall file it with the Council. [*77732]

(8) *Termination.* If any signatory determines that the terms of a memorandum of agreement cannot be or are not being carried out, the signatories shall consult to seek amendment of the agreement. If the agreement is not amended, any signatory may terminate it. The agency official shall either execute a memorandum of agreement with signatories under paragraph (c)(1) of this section or request the comments of the Council under § 800.7(a).

(9) *Copies.* The agency official shall provide each consulting party with a copy of any memorandum of agreement executed pursuant to this subpart.

§ 800.7 -- Failure to resolve adverse effects.

(a) *Termination of consultation.* After consulting to resolve adverse effects pursuant to § 800.6(b)(2), the agency official, the SHPO/THPO, or the Council may determine that further consultation will not be productive and terminate consultation. Any party that terminates consultation shall notify the other consulting parties and provide them the reasons for terminating in writing.

(1) If the agency official terminates consultation, the head of the agency or an Assistant Secretary or other officer with major department-wide or agency-wide responsibilities shall request that the Council comment pursuant to paragraph (c) of this section and shall notify all consulting parties of the request.

(2) If the SHPO terminates consultation, the agency official and the Council may execute a memorandum of agreement without the SHPO's involvement.

(3) If a THPO terminates consultation regarding an undertaking occurring on or affecting historic properties on its tribal lands, the Council shall comment pursuant to paragraph (c) of this section.

(4) If the Council terminates consultation, the Council shall notify the agency official, the agency's Federal preservation officer and all consulting parties of the termination and comment under paragraph (c) of this section. The Council may consult with the agency's Federal preservation officer prior to terminating consultation to seek to resolve issues concerning the undertaking and its effects on historic properties.

(b) *Comments without termination.* The Council may determine that it is appropriate to provide additional advisory comments upon an undertaking for which a memorandum of agreement will be executed. The Council shall provide them to the agency official when it executes the memorandum of agreement.

(c) *Comments by the Council.*

(1) *Preparation.* The Council shall provide an opportunity for the agency official, all consulting parties, and the public to provide their views within the time frame for developing its comments. Upon request of the Council, the agency official shall provide additional existing information concerning the undertaking and assist the Council in arranging an onsite inspection and an opportunity for public participation.

(2) *Timing.* The Council shall transmit its comments within 45 days of receipt of a request under paragraph (a)(1) or (a)(3) of this section or § 800.8(c)(3), or termination by the Council under § 800.6(b)(1)(v) or paragraph (a)(4) of this section, unless otherwise agreed to by the agency official.

(3) *Transmittal.* The Council shall provide its comments to the head of the agency requesting comment with copies to the agency official, the agency's Federal preservation officer, all consulting parties, and others as appropriate.

(4) *Response to Council comment.* The head of the agency shall take into account the Council's comments in reaching a final decision on the undertaking. Section 110(l) of the act directs that the head of the agency shall document this decision and may not delegate his or her responsibilities pursuant to section 106. Documenting the agency head's decision shall include:

(i) Preparing a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's comments and providing it to the Council prior to approval of the undertaking;

(ii) Providing a copy of the summary to all consulting parties; and

(iii) Notifying the public and making the record available for public inspection.

§ 800.8 -- Coordination With the National Environmental Policy Act.

(a) *General principles.*

(1) *Early coordination.* Federal agencies are encouraged to coordinate compliance with section 106 and the procedures in this part with any steps taken to meet the requirements of the National Environmental Policy Act (NEPA). Agencies should consider their section 106 responsibilities as early as possible in the NEPA process, and plan their public participation, analysis, and review in such a way that they can meet the purposes and requirements of both statutes in a timely and efficient manner. The determination of whether an undertaking is a "major Federal action significantly affecting the quality of the human environment," and therefore requires preparation of an environmental impact statement (EIS) under NEPA, should include consideration of the undertaking's likely effects on historic properties. A finding of adverse effect on a historic property does not necessarily require an EIS under NEPA.

(2) *Consulting party roles.* SHPO/THPOs, Indian tribes, and Native Hawaiian organizations, other consulting parties, and organizations and individuals who may be concerned with the possible effects of an agency action on historic properties should be prepared to consult with agencies early in the NEPA process, when the purpose of and need for the proposed action as well as the widest possible range of alternatives are under consideration.

(3) *Inclusion of historic preservation issues.* Agency officials should ensure that preparation of an environmental assessment (EA) and finding of no significant impact (FONSI) or an EIS and record of decision (ROD) includes appropriate scoping, identification of historic properties, assessment of effects upon them, and consultation leading to resolution of any adverse effects.

(b) *Actions categorically excluded under NEPA.* If a project, activity or program is categorically excluded from NEPA review under an agency's NEPA procedures, the agency official shall determine if it still qualifies as an undertaking requiring review under section 106 pursuant to § 800.3(a). If so, the agency official shall proceed with section 106 review in accordance with the procedures in this subpart.

(c) *Use of the NEPA process for section 106 purposes.* An agency official may use the process and documentation required for the preparation of an EA/FONSI or an EIS/ROD to comply with section 106 in lieu of the procedures set forth in §§ 800.3 through 800.6 if the agency official has notified in advance the SHPO/THPO and the Council that it intends to do so and the following standards are met.

(1) *Standards for developing environmental documents to comply with Section 106.* During preparation of the EA or draft EIS (DEIS) the agency official shall:

(i) Identify consulting parties either pursuant to § 800.3(f) or through the NEPA scoping process with results consistent with § 800.3(f);

(ii) Identify historic properties and assess the effects of the undertaking on such properties in a manner consistent with the standards and criteria of §§ 800.4 through 800.5, provided that the scope and timing of these steps may be phased to reflect the agency official's [*77733] consideration of project alternatives in the NEPA process and the effort is commensurate with the assessment of other environmental factors;

(iii) Consult regarding the effects of the undertaking on historic properties with the SHPO/THPO, Indian tribes, and Native Hawaiian organizations that might attach religious and cultural significance to affected historic properties, other consulting parties, and the Council, where appropriate, during NEPA scoping, environmental analysis, and the preparation of NEPA documents;

(iv) Involve the public in accordance with the agency's published NEPA procedures; and (v) Develop in consultation with identified consulting parties alternatives and proposed measures that might avoid, minimize or mitigate any adverse effects of the undertaking on historic properties and describe them in the EA or DEIS.

(2) *Review of environmental documents.*

(i) The agency official shall submit the EA, DEIS, or EIS to the SHPO/THPO, Indian tribes, and Native Hawaiian organizations that might attach religious and cultural significance to affected historic properties, and other consulting parties prior to or when making the document available for public comment. If the document being prepared is a DEIS or EIS, the agency official shall also submit it to the Council.

(ii) Prior to or within the time allowed for public comment on the document, a SHPO/THPO, an Indian tribe or Native Hawaiian organization, another consulting party or the Council may object to the agency official that preparation of the EA, DEIS, or EIS has not met the standards set forth in paragraph (c)(1) of this section or that the substantive resolution of the effects on historic properties proposed in an EA, DEIS, or EIS is inadequate. If the agency official receives such an objection, the agency official shall refer the matter to the Council.

(3) *Resolution of objections.* Within 30 days of the agency official's referral of an objection under paragraph (c)(2)(ii) of this section, the Council shall notify the agency official either that it agrees with the objection, in which case the agency official shall enter into consultation in accordance with § 800.6(b)(2) or seek Council comments in accordance with § 800.7(a), or that it disagrees with the objection, in which case the agency official shall continue its compliance with this section. Failure of the Council to respond within the 30 day period shall be considered disagreement with the objection.

(4) *Approval of the undertaking.* If the agency official has found, during the preparation of an EA or EIS that the effects of an undertaking on historic properties are adverse, the agency official shall develop measures in the EA, DEIS, or EIS to avoid, minimize, or mitigate such effects in accordance with paragraph (c)(1)(v) of this section. The agency official's responsibilities under section 106 and the procedures in this subpart shall then be satisfied when either:

(i) A binding commitment to such proposed measures is incorporated in:

(A) The ROD, if such measures were proposed in a DEIS or EIS; or

(B) An MOA drafted in compliance with § 800.6(c); or

(ii) The Council has commented under § 800.7 and received the agency's response to such comments.

(5) *Modification of the undertaking.* If the undertaking is modified after approval of the FONSI or the ROD in a manner that changes the undertaking or alters its effects on historic properties, or if the agency official fails to ensure that the measures to avoid, minimize or mitigate adverse effects (as specified in either the FONSI or the ROD, or in the binding commitment adopted pursuant to paragraph (c)(4) of this section) are carried out, the agency official shall notify the Council and all consulting parties that supplemental environmental documents will be prepared in compliance with NEPA or that the procedures in §§ 800.3 through 800.6 will be followed as necessary.

§ 800.9 -- Council review of section 106 compliance.

(a) *Assessment of agency official compliance for individual undertakings.* The Council may provide to the agency official its advisory opinion regarding the substance of any finding, determination or decision or regarding the adequacy of the agency official's compliance with the procedures under this part. The Council may provide such advice at any time at the request of any individual, agency or organization or on its own initiative. The agency official shall consider the views of the Council in reaching a decision on the matter in question.

(b) *Agency foreclosure of the Council's opportunity to comment.* Where an agency official has failed to complete the requirements of section 106 in accordance with the procedures in this part prior to the approval of an undertaking, the Council's opportunity to comment may be foreclosed. The Council may review a case to determine whether a foreclosure has occurred. The Council shall notify the agency official and the agency's Federal preservation officer and allow 30 days for the agency official to provide information as to whether foreclosure has occurred. If the Council determines foreclosure has occurred, the Council shall transmit the determination to the agency official and the head of the agency. The Council shall also make the determination available to the public and any parties known to be interested in the undertaking and its effects upon historic properties.

(c) *Intentional adverse effects by applicants.*

(1) *Agency responsibility.* Section 110(k) of the act prohibits a Federal agency from granting a loan, loan guarantee, permit, license or other assistance to an applicant who, with intent to avoid the requirements of section 106, has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, has allowed such significant adverse effect to occur, unless the agency, after consultation with the Council,

determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. Guidance issued by the Secretary pursuant to section 110 of the act governs its implementation.

(2) *Consultation with the Council.* When an agency official determines, based on the actions of an applicant, that section 110(k) isectioicable and that circumstances may justify granting the assistance, the agency official shall notify the Council and provide documentation specifying the circumstances under which the adverse effects to the historic property occurred and the degree of damage to the integrity of the property. This documentation shall include any views obtained from the applicant, SHPO/THPO, an Indian tribe if the undertaking occurs on or affects historic properties on tribal lands, and other parties known to be interested in the undertaking.

(i) Within thirty days of receiving the agency official's notification, unless otherwise agreed to by the agency official, the Council shall provide the agency official with its opinion as to whether circumstances justify granting assistance to the applicant and any possible mitigation of the adverse effects.

(ii) The agency official shall consider the Council's opinion in making a decision on whether to grant assistance to the applicant, and shall notify the Council, the SHPO/THPO, and other parties known to be interested in the undertaking prior to granting the assistance. [*77734]

(3) *Compliance with Section 106.* If an agency official, after consulting with the Council, determines to grant the assistance, the agency official shall comply with §§ 800.3 through 800.6 to take into account the effects of the undertaking on any historic properties.

(d) *Evaluation of Section 106 operations.* The Council may evaluate the operation of the section 106 process by periodic reviews of how participants have fulfilled their legal responsibilities and how effectively the outcomes reached advance the purposes of the act.

(1) *Information from participants.* Section 203 of the act authorizes the Council to obtain information from Federal agencies necessary to conduct evaluation of the section 106 process. The agency official shall make documentation of agency policies, operating procedures and actions taken to comply with section 106 available to the Council upon request. The Council may request available information and documentation from other participants in the section 106 process.

(2) *Improving the operation of section 106.* Based upon any evaluation of the section 106 process, the Council may make recommendations to participants, the heads of Federal agencies, and the Secretary of actions to improve the efficiency and effectiveness of the process. Where the Council determines that an agency official or a SHPO/THPO has failed to properly carry out the responsibilities assigned under the process in this part, the Council may participate in individual case reviews conducted under such process in addition to the SHPO/THPO for such period that it determines is necessary to improve performance or correct deficiencies. If the Council finds a pattern of failure by a Federal agency in carrying out its responsibilities under section 106, the Council may review the policies and programs of the agency related to historic preservation pursuant to section 202(a)(6) of the act and recommend methods to improve the effectiveness, coordination, and consistency of those policies and programs with section 106.

§ 800.10 -- Special requirements for protecting National Historic Landmarks.

(a) *Statutory requirement.* Section 110(f) of the act requires that the agency official, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to any National Historic Landmark that may be directly and adversely affected by an undertaking. When commenting on such undertakings, the Council shall use the process set forth in §§ 800.6 through 800.7 and give special consideration to protecting National Historic Landmarks as specified in this section.

(b) *Resolution of adverse effects.* The agency official shall request the Council to participate in any consultation to resolve adverse effects on National Historic Landmarks conducted under § 800.6.

(c) *Involvement of the Secretary.* The agency official shall notify the Secretary of any consultation involving a National Historic Landmark and invite the Secretary to participate in the consultation where there may be an adverse effect. The Council may request a report from the Secretary under section 213 of the act to assist in the consultation.

(d) *Report of outcome.* When the Council participates in consultation under this section, it shall report the outcome of the section 106 process, providing its written comments or any memoranda of agreement to which it is a signatory, to the Secretary and the head of the agency responsible for the undertaking.

§ 800.11 -- Documentation standards.

(a) *Adequacy of documentation.* The agency official shall ensure that a determination, finding, or agreement under the procedures in this subpart is supported by sufficient documentation to enable any reviewing parties to understand its basis. The agency official shall provide such documentation to the extent permitted by law and within available funds. When an agency official is conducting phased identification or evaluation under this subpart, the documentation standards regarding description of historic properties may be applied flexibly. If the Council, or the SHPO/THPO when the Council is not involved, determines the applicable documentation standards are not met, the Council or the SHPO/THPO, as appropriate, shall notify the agency official and specify the information needed to meet the standard. At the request of the agency official or any of the consulting parties, the Council shall review any disputes over whether documentation standards are met and provide its views to the agency official and the consulting parties.

(b) *Format.* The agency official may use documentation prepared to comply with other laws to fulfill the requirements of the procedures in this subpart, if that documentation meets the standards of this section.

(c) *Confidentiality.*

(1) *Authority to withhold information.* Section 304 of the act provides that the head of a Federal agency or other public official receiving grant assistance pursuant to the act, after consultation with the Secretary, shall withhold from public disclosure information about the location, character, or ownership of a historic property when disclosure may cause a significant invasion of privacy; risk harm to the historic property; or impede the use of a traditional religious site by practitioners. When the head of a Federal agency or other public official has determined that information should be withheld from the public pursuant to these criteria, the Secretary, in consultation with such Federal agency head or official, shall determine who may have access to the information for the purposes of carrying out the act.

(2) *Consultation with the Council.* When the information in question has been developed in the course of an agency's compliance with this part, the Secretary shall consult with the Council in reaching determinations on the withholding and release of information. The Federal agency shall provide the Council with available information, including views of the SHPO/THPO, Indian tribes and Native Hawaiian organizations, related to the confidentiality concern. The Council shall advise the Secretary and the Federal agency within 30 days of receipt of adequate documentation.

(3) *Other authorities affecting confidentiality.* Other Federal laws and program requirements may limit public access to information concerning an undertaking and its effects on historic properties. Where applicable, those authorities shall govern public access to information developed in the section 106 process and may authorize the agency official to protect the privacy of non-governmental applicants.

(d) *Finding of no historic properties affected.* Documentation shall include:

(1) A description of the undertaking, specifying the Federal involvement, and its area of potential effects, including photographs, maps, drawings, as necessary;

(2) A description of the steps taken to identify historic properties, including, as appropriate, efforts to seek information pursuant to § 800.4(b); and

(3) The basis for determining that no historic properties are present or affected.

(e) *Finding of no adverse effect or adverse effect.* Documentation shall include:

(1) A description of the undertaking, specifying the Federal involvement, and its area of potential effects, including photographs, maps, and drawings, as necessary;

(2) A description of the steps taken to identify historic properties; [*77735]

(3) A description of the affected historic properties, including information on the characteristics that qualify them for the National Register;

(4) A description of the undertaking's effects on historic properties;

(5) An explanation of why the criteria of adverse effect were found applicable or inapplicable, including any conditions or future actions to avoid, minimize or mitigate adverse effects; and

(6) Copies or summaries of any views provided by consulting parties and the public.

(f) *Memorandum of agreement.* When a memorandum of agreement is filed with the Council, the documentation shall include, any substantive revisions or additions to the documentation provided the Council pursuant to § 800.6(a)(1), an evaluation of any measures considered to avoid or minimize the undertaking's adverse effects and a summary of the views of consulting parties and the public.

(g) *Requests for comment without a memorandum of agreement. Documentation shall include:*

(1) A description and evaluation of any alternatives or mitigation measures that the agency official proposes to resolve the undertaking's adverse effects;

(2) A description of any reasonable alternatives or mitigation measures that were considered but not chosen, and the reasons for their rejection;

(3) Copies or summaries of any views submitted to the agency official concerning the adverse effects of the undertaking on historic properties and alternatives to reduce or avoid those effects; and

(4) Any substantive revisions or additions to the documentation provided the Council pursuant to § 800.6(a)(1).

§ 800.12 -- Emergency situations.

(a) *Agency procedures.* The agency official, in consultation with the appropriate SHPOs/THPOs, affected Indian tribes and Native Hawaiian organizations, and the Council, is encouraged to develop procedures for taking historic properties into account during operations which respond to a disaster or emergency declared by the President, a tribal government, or the Governor of a State or which respond to other immediate threats to life or property. If approved by the Council, the procedures shall govern the agency's historic preservation responsibilities during any disaster or emergency in lieu of §§ 800.3 through 800.6.

(b) *Alternatives to agency procedures.* In the event an agency official proposes an emergency undertaking as an essential and immediate response to a disaster or emergency declared by the President, a tribal government, or the Governor of a State or another immediate threat to life or property, and the agency has not developed procedures pursuant to paragraph (a) of this section, the agency official may comply with section 106 by:

(1) Following a programmatic agreement developed pursuant to § 800.14(b) that contains specific provisions for dealing with historic properties in emergency situations; or

(2) Notifying the Council, the appropriate SHPO/THPO and any Indian tribe or Native Hawaiian organization that may attach religious and cultural significance to historic properties likely to be affected prior to the undertaking and affording them an opportunity to comment within seven days of notification. If the agency official determines that circumstances do not permit seven days for comment, the agency official shall notify the Council, the SHPO/THPO and the Indian tribe or Native Hawaiian organization and invite any comments within the time available.

(c) *Local governments responsible for section 106 compliance.* When a local government official serves as the agency official for section 106 compliance, paragraphs (a) and (b) of this section also apply to an imminent threat to public health or safety as a result of a natural disaster or emergency declared by a local government's chief executive officer or legislative body, provided that if the Council or SHPO/THPO objects to the proposed action within seven days, the agency official shall comply with §§ 800.3 through 800.6.

(d) *Applicability.* This section applies only to undertakings that will be implemented within 30 days after the disaster or emergency has been formally declared by the appropriate authority. An agency may request an extension of the period of applicability from the Council prior to the expiration of the 30 days. Immediate rescue and salvage operations conducted to preserve life or property are exempt from the provisions of section 106 and this part.

§ 800.13 -- Post-review discoveries.

(a) *Planning for subsequent discoveries.*

(1) *Using a programmatic agreement.* An agency official may develop a programmatic agreement pursuant to § 800.14(b) to govern the actions to be taken when historic properties are discovered during the implementation of an undertaking.

(2) *Using agreement documents.* When the agency official's identification efforts in accordance with § 800.4 indicate that historic properties are likely to be discovered during implementation of an undertaking and no programmatic

agreement has been developed pursuant to paragraph (a)(1) of this section, the agency official shall include in any finding of no adverse effect or memorandum of agreement a process to resolve any adverse effects upon such properties. Actions in conformance with the process satisfy the agency official's responsibilities under section 106 and this part.

(b) *Discoveries without prior planning.* If historic properties are discovered or unanticipated effects on historic properties found after the agency official has completed the section 106 process without establishing a process under paragraph (a) of this section, the agency official shall make reasonable efforts to avoid, minimize or mitigate adverse effects to such properties and:

(1) If the agency official has not approved the undertaking or if construction on an approved undertaking has not commenced, consult to resolve adverse effects pursuant to § 800.6; or

(2) If the agency official, the SHPO/THPO and any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to the affected property agree that such property is of value solely for its scientific, prehistoric, historic or archeological data, the agency official may comply with the Archeological and Historic Preservation Act instead of the procedures in this part and provide the Council, the SHPO/THPO, and the Indian tribe or Native Hawaiian organization with a report on the actions within a reasonable time after they are completed; or

(3) If the agency official has approved the undertaking and construction has commenced, determine actions that the agency official can take to resolve adverse effects, and notify the SHPO/THPO, any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to the affected property, and the Council within 48 hours of the discovery. The notification shall describe the agency official's assessment of National Register eligibility of the property and proposed actions to resolve the adverse effects. The SHPO/THPO, the Indian tribe or Native Hawaiian organization and the Council shall respond within 48 hours of the notification. The agency official shall take into account their recommendations regarding National [*77736] Register eligibility and proposed actions, and then carry out appropriate actions. The agency official shall provide the SHPO/THPO, the Indian tribe or Native Hawaiian organization and the Council a report of the actions when they are completed.

(c) *Eligibility of properties.* The agency official, in consultation with the SHPO/THPO, may assume a newly-discovered property to be eligible for the National Register for purposes of section 106. The agency official shall specify the National Register criteria used to assume the property's eligibility so that information can be used in the resolution of adverse effects.

(d) *Discoveries on tribal lands.* If historic properties are discovered on tribal lands, or there are unanticipated effects on historic properties found on tribal lands, after the agency official has completed the section 106 process without establishing a process under paragraph (a) of this section and construction has commenced, the agency official shall comply with applicable tribal regulations and procedures and obtain the concurrence of the Indian tribe on the proposed action.

Subpart C--Program Alternatives

§ 800.14 -- Federal agency program alternatives.

(a) *Alternate procedures.* An agency official may develop procedures to implement section 106 and substitute them for all or part of subpart B of this part if they are consistent with the Council's regulations pursuant to section 110(a)(2)(E) of the act.

(1) *Development of procedures.* The agency official shall consult with the Council, the National Conference of State Historic Preservation Officers, or individual SHPO/THPOs, as appropriate, and Indian tribes and Native Hawaiian organizations, as specified in paragraph (f) of this section, in the development of alternate procedures, publish notice of the availability of proposed alternate procedures in the **Federal Register** and take other appropriate steps to seek public input during the development of alternate procedures.

(2) *Council review.* The agency official shall submit the proposed alternate procedures to the Council for a 60-day review period. If the Council finds the procedures to be consistent with this part, it shall notify the agency official and the agency official may adopt them as final alternate procedures.

(3) *Notice.* The agency official shall notify the parties with which it has consulted and publish notice of final alternate procedures in the **Federal Register**.

(4) *Legal effect.* Alternate procedures adopted pursuant to this subpart substitute for the Council's regulations for the purposes of the agency's compliance with section 106, except that where an Indian tribe has entered into an agreement with the Council to substitute tribal historic preservation regulations for the Council's regulations under section 101(d)(5) of the act, the agency shall follow those regulations in lieu of the agency's procedures regarding undertakings on tribal lands. Prior to the Council entering into such agreements, the Council will provide Federal agencies notice and opportunity to comment on the proposed substitute tribal regulations.

(b) *Programmatic agreements.* The Council and the agency official may negotiate a programmatic agreement to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings.

(1) *Use of programmatic agreements.* A programmatic agreement may be used:

(i) When effects on historic properties are similar and repetitive or are multi-State or regional in scope;

(ii) When effects on historic properties cannot be fully determined prior to approval of an undertaking;

(iii) When nonfederal parties are delegated major decisionmaking responsibilities;

(iv) Where routine management activities are undertaken at Federal installations, facilities, or other land-management units; or

(v) Where other circumstances warrant a departure from the normal section 106 process.

(2) *Developing programmatic agreements for agency programs.*

(i) The consultation shall involve, as appropriate, SHPO/THPOs, the National Conference of State Historic Preservation Officers (NCSHPO), Indian tribes and Native Hawaiian organizations, other Federal agencies, and members of the public. If the programmatic agreement has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the agency official shall also follow paragraph (f) of this section.

(ii) *Public participation.* The agency official shall arrange for public participation appropriate to the subject matter and the scope of the program and in accordance with subpart A of this part. The agency official shall consider the nature of the program and its likely effects on historic properties and take steps to involve the individuals, organizations and entities likely to be interested.

(iii) *Effect.* The programmatic agreement shall take effect when executed by the Council, the agency official and the appropriate SHPOs/THPOs when the programmatic agreement concerns a specific region or the president of NCSHPO when NCSHPO has participated in the consultation. A programmatic agreement shall take effect on tribal lands only when the THPO, Indian tribe, or a designated representative of the tribe is a signatory to the agreement. Compliance with the procedures established by an approved programmatic agreement satisfies the agency's section 106 responsibilities for all individual undertakings of the program covered by the agreement until it expires or is terminated by the agency, the president of NCSHPO when a signatory, or the Council. Termination by an individual SHPO/THPO shall only terminate the application of a regional programmatic agreement within the jurisdiction of the SHPO/THPO. If a THPO assumes the responsibilities of a SHPO pursuant to section 101(d)(2) of the act and the SHPO is signatory to programmatic agreement, the THPO assumes the role of a signatory, including the right to terminate a regional programmatic agreement on lands under the jurisdiction of the tribe.

(iv) *Notice.* The agency official shall notify the parties with which it has consulted that a programmatic agreement has been executed under paragraph (b) of this section, provide appropriate public notice before it takes effect, and make any internal agency procedures implementing the agreement readily available to the Council, SHPO/THPOs, and the public.

(v) If the Council determines that the terms of a programmatic agreement are not being carried out, or if such an agreement is terminated, the agency official shall comply with subpart B of this part with regard to individual undertakings of the program covered by the agreement.

(3) *Developing programmatic agreements for complex or multiple undertakings.* Consultation to develop a programmatic agreement for dealing with the potential adverse effects of complex projects or multiple undertakings shall follow § 800.6. If consultation pertains to an activity involving multiple undertakings and the parties fail to reach

agreement, then the agency official shall comply with the [*77737] provisions of subpart B of this part for each individual undertaking.

(4) *Prototype programmatic agreements.* The Council may designate an agreement document as a prototype programmatic agreement that may be used for the same type of program or undertaking in more than one case or area. When an agency official uses such a prototype programmatic agreement, the agency official may develop and execute the agreement with the appropriate SHPO/THPO and the agreement shall become final without need for Council participation in consultation or Council signature.

(c) *Exempted categories.*

(1) *Criteria for establishing.* An agency official may propose a program or category of agency undertakings that may be exempted from review under the provisions of subpart B of this part, if the program or category meets the following criteria:

(i) The actions within the program or category would otherwise qualify as "undertakings" as defined in § 800.16;

(ii) The potential effects of the undertakings within the program or category upon historic properties are foreseeable and likely to be minimal or not adverse; and

(iii) Exemption of the program or category is consistent with the purposes of the act.

(2) *Public participation.* The agency official shall arrange for public participation appropriate to the subject matter and the scope of the exemption and in accordance with the standards in subpart A of this part. The agency official shall consider the nature of the exemption and its likely effects on historic properties and take steps to involve individuals, organizations and entities likely to be interested.

(3) *Consultation with SHPOs/THPOs.* The agency official shall notify and consider the views of the SHPOs/THPOs on the exemption.

(4) *Consultation with Indian tribes and Native Hawaiian organizations.* If the exempted program or category of undertakings has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the Council shall follow the requirements for the agency official set forth in paragraph (f) of this section.

(5) *Council review of proposed exemptions.* The Council shall review a request for an exemption that is supported by documentation describing the program or category for which the exemption is sought, demonstrating that the criteria of paragraph (c)(1) of this section have been met, describing the methods used to seek the views of the public, and summarizing any views submitted by the SHPO/THPOs, the public, and any others consulted. Unless it requests further information, the Council shall approve or reject the proposed exemption within 30 days of receipt, and thereafter notify the agency official and SHPO/THPOs of the decision. The decision shall be based on the consistency of the exemption with the purposes of the act, taking into consideration the magnitude of the exempted undertaking or program and the likelihood of impairment of historic properties in accordance with section 214 of the act.

(6) *Legal consequences.* Any undertaking that falls within an approved exempted program or category shall require no further review pursuant to subpart B of this part, unless the agency official or the Council determines that there are circumstances under which the normally excluded undertaking should be reviewed under subpart B of this part.

(7) *Termination.* The Council may terminate an exemption at the request of the agency official or when the Council determines that the exemption no longer meets the criteria of paragraph (c)(1) of this section. The Council shall notify the agency official 30 days before termination becomes effective.

(8) *Notice.* The agency official shall publish notice of any approved exemption in the **Federal Register**.

(d) *Standard treatments.*

(1) *Establishment.* The Council, on its own initiative or at the request of another party, may establish standard methods for the treatment of a category of historic properties, a category of undertakings, or a category of effects on historic properties to assist Federal agencies in satisfying the requirements of subpart B of this part. The Council shall publish notice of standard treatments in the **Federal Register**.

(2) *Public participation.* The Council shall arrange for public participation appropriate to the subject matter and the scope of the standard treatment and consistent with subpart A of this part. The Council shall consider the nature of the

standard treatment and its likely effects on historic properties and the individuals, organizations and entities likely to be interested. Where an agency official has proposed a standard treatment, the Council may request the agency official to arrange for public involvement.

(3) *Consultation with SHPOs/THPOs.* The Council shall notify and consider the views of SHPOs/THPOs on the proposed standard treatment.

(4) *Consultation with Indian tribes and Native Hawaiian organizations.* If the proposed standard treatment has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the Council shall follow the requirements for the agency official set forth in paragraph (f) of this section.

(5) *Termination.* The Council may terminate a standard treatment by publication of a notice in the **Federal Register** 30 days before the termination takes effect.

(e) *Program comments.* An agency official may request the Council to comment on a category of undertakings in lieu of conducting individual reviews under §§ 800.4 through 800.6. The Council may provide program comments at its own initiative.

(1) *Agency request.* The agency official shall identify the category of undertakings, specify the likely effects on historic properties, specify the steps the agency official will take to ensure that the effects are taken into account, identify the time period for which the comment is requested and summarize any views submitted by the public.

(2) *Public participation.* The agency official shall arrange for public participation appropriate to the subject matter and the scope of the category and in accordance with the standards in subpart A of this part. The agency official shall consider the nature of the undertakings and their likely effects on historic properties and the individuals, organizations and entities likely to be interested.

(3) *Consultation with SHPOs/THPOs.* The Council shall notify and consider the views of SHPOs/THPOs on the proposed program comment.

(4) *Consultation with Indian tribes and Native Hawaiian organizations.* If the program comment has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the Council shall follow the requirements for the agency official set forth in paragraph (f) of this section.

(5) *Council action.* Unless the Council requests additional documentation, notifies the agency official that it will decline to comment, or obtains the consent of the agency official to extend the period for providing comment, the Council shall comment to the agency official within 45 days of the request.

(i) If the Council comments, the agency official shall take into account the comments of the Council in carrying out the undertakings within the category and publish notice in the **Federal** [*77738] **Register** of the Council's comments and steps the agency will take to ensure that effects to historic properties are taken into account.

(ii) If the Council declines to comment, the agency official shall continue to comply with the requirements of §§ 800.3 through 800.6 for the individual undertakings.

(6) *Withdrawal of comment.* If the Council determines that the consideration of historic properties is not being carried out in a manner consistent with the program comment, the Council may withdraw the comment and the agency official shall comply with the requirements of §§ 800.3 through 800.6 for the individual undertakings.

(f) *Consultation with Indian tribes and Native Hawaiian organizations when developing program alternatives.* Whenever an agency official proposes a program alternative pursuant to paragraphs (a) through (e) of this section, the agency official shall ensure that development of the program alternative includes appropriate government-to-government consultation with affected Indian tribes and consultation with affected Native Hawaiian organizations.

(1) *Identifying affected Indian tribes and Native Hawaiian organizations.* If any undertaking covered by a proposed program alternative has the potential to affect historic properties on tribal lands, the agency official shall identify and consult with the Indian tribes having jurisdiction over such lands. If a proposed program alternative has the potential to affect historic properties of religious and cultural significance to an Indian tribe or a Native Hawaiian organization which are located off tribal lands, the agency official shall identify those Indian tribes and Native Hawaiian organizations that might attach religious and cultural significance to such properties and consult with them. When a proposed

program alternative has nationwide applicability, the agency official shall identify an appropriate government to government consultation with Indian tribes and consult with Native Hawaiian organizations in accordance with existing Executive orders, Presidential memoranda, and applicable provisions of law.

(2) *Results of consultation.* The agency official shall provide summaries of the views, along with copies of any written comments, provided by affected Indian tribes and Native Hawaiian organizations to the Council as part of the documentation for the proposed program alternative. The agency official and the Council shall take those views into account in reaching a final decision on the proposed program alternative.

§ 800.15 -- Tribal, State, and local program alternatives. [Reserved]

§ 800.16 -- Definitions.

(a) *Act* means the National Historic Preservation Act of 1966, as amended, *16 U.S.C. 470*-470w-6.

(b) *Agency* means agency as defined in *5 U.S.C. 551*.

(c) *Approval of the expenditure of funds* means any final agency decision authorizing or permitting the expenditure of Federal funds or financial assistance on an undertaking, including any agency decision that may be subject to an administrative appeal.

(d) *Area of potential effects* means the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.

(e) *Comment* means the findings and recommendations of the Council formally provided in writing to the head of a Federal agency under section 106.

(f) *Consultation* means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process. The Secretary's "Standards and Guidelines for Federal Agency Preservation Programs pursuant to the National Historic Preservation Act" provide further guidance on consultation.

(g) *Council* means the Advisory Council on Historic Preservation or a Council member or employee designated to act for the Council.

(h) *Day* or *days* means calendar days.

(i) *Effect* means alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register.

(j) *Foreclosure* means an action taken by an agency official that effectively precludes the Council from providing comments which the agency official can meaningfully consider prior to the approval of the undertaking.

(k) *Head of the agency* means the chief official of the Federal agency responsible for all aspects of the agency's actions. If a State, local, or tribal government has assumed or has been delegated responsibility for section 106 compliance, the head of that unit of government shall be considered the head of the agency.

(l)(1) *Historic property* means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria.

(2) The term *eligible for inclusion in the National Register* includes both properties formally determined as such in accordance with regulations of the Secretary of the Interior and all other properties that meet the National Register criteria.

(m) *Indian tribe* means an Indian tribe, band, nation, or other organized group or community, including a native village, regional corporation, or village corporation, as those terms are defined in section 3 of the Alaska Native Claims

Settlement Act *(43 U.S.C. 1602),* which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(n) *Local government* means a city, county, parish, township, municipality, borough, or other general purpose political subdivision of a State.

(o) *Memorandum of agreement* means the document that records the terms and conditions agreed upon to resolve the adverse effects of an undertaking upon historic properties.

(p) *National Historic Landmark* means a historic property that the Secretary of the Interior has designated a National Historic Landmark.

(q) *National Register* means the National Register of Historic Places maintained by the Secretary of the Interior.

(r) *National Register criteria* means the criteria established by the Secretary of the Interior for use in evaluating the eligibility of properties for the National Register (36 CFR part 60).

(s)(1) *Native Hawaiian organization* means any organization which serves and represents the interests of Native Hawaiians; has as a primary and stated purpose the provision of services to Native Hawaiians; and has demonstrated expertise in aspects of historic preservation that are significant to Native Hawaiians.

(2) *Native Hawaiian* means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

(t) *Programmatic agreement* means a document that records the terms and [*77739] conditions agreed upon to resolve the potential adverse effects of a Federal agency program, complex undertaking or other situations in accordance with § 800.14(b).

(u) *Secretary* means the Secretary of the Interior acting through the Director of the National Park Service except where otherwise specified.

(v) *State Historic Preservation Officer (SHPO)* means the official appointed or designated pursuant to section 101(b)(1) of the act to administer the State historic preservation program or a representative designated to act for the State historic preservation officer.

(w) *Tribal Historic Preservation Officer (THPO)* means the tribal official appointed by the tribe's chief governing authority or designated by a tribal ordinance or preservation program who has assumed the responsibilities of the SHPO for purposes of section 106 compliance on tribal lands in accordance with section 101(d)(2) of the act.

(x) *Tribal lands* means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.

(y) *Undertaking* means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; those requiring a Federal permit, license or approval; and those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

Appendix A to Part 800--Criteria for Council Involvement in Reviewing Individual section 106 Cases

(a) *Introduction.* This appendix sets forth the criteria that will be used by the Council to determine whether to enter an individual section 106 review that it normally would not be involved in.

(b) *General policy.* The Council may choose to exercise its authorities under the section 106 regulations to participate in an individual project pursuant to the following criteria. However, the Council will not always elect to participate even though one or more of the criteria may be met.

(c) *Specific criteria.* The Council is likely to enter the section 106 process at the steps specified in the regulations in this part when an undertaking:

(1) *Has substantial impacts on important historic properties.* This may include adverse effects on properties that possess a national level of significance or on properties that are of unusual or noteworthy importance or are a rare property type; or adverse effects to large numbers of historic properties, such as impacts to multiple properties within a historic district.

(2) *Presents important questions of policy or interpretation.* This may include questions about how the Council's regulations are being applied or interpreted, including possible foreclosure or anticipatory demolition situations; situations where the outcome will set a precedent affecting Council policies or program goals; or the development of programmatic agreements that alter the way the section 106 process is applied to a group or type of undertakings.

(3) *Has the potential for presenting procedural problems.* This may include cases with substantial public controversy that is related to historic preservation issues; with disputes among or about consulting parties which the Council's involvement could help resolve; that are involved or likely to be involved in litigation on the basis of section 106; or carried out by a Federal agency, in a State or locality, or on tribal lands where the Council has previously identified problems with section 106 compliance pursuant to § 800.9(d)(2).

(4) *Presents issues of concern to Indian tribes or Native Hawaiian organizations.* This may include cases where there have been concerns raised about the identification of, evaluation of or assessment of effects on historic properties to which an Indian tribe or Native Hawaiian organization attaches religious and cultural significance; where an Indian tribe or Native Hawaiian organization has requested Council involvement to assist in the resolution of adverse effects; or where there are questions relating to policy, interpretation or precedent under section 106 or its relation to other authorities, such as the Native American Graves Protection and Repatriation Act.

Dated: December 4th, 2000.

John M. Fowler,

Executive Director.

[FR Doc. 00-31253 Filed 12-11-00; 8:45 am]

BILLING CODE 4310-10-P

FEDERAL REGISTER

Vol. 71, No. 111

Proposed Rules

DEPARTMENT OF TRANSPORTATION (DOT)

Federal Highway Administration (FHWA)

DEPARTMENT OF TRANSPORTATION (DOT)

Federal Transit Administration

23 CFR Parts 450 and 500

49 CFR Part 613

[Docket No. FHWA-2005-22986]

FHWA RIN 2125-AF09; FTA RIN 2132-AA82

Statewide Transportation Planning; Metropolitan Transportation Planning

Part II

71 FR 33510

DATE: Friday, June 9, 2006

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

SUMMARY: The FHWA and the FTA are jointly issuing this document which proposes the revision of regulations governing the development of metropolitan transportation plans and programs for urbanized areas, State transportation plans and programs and the regulations for Congestion Management Systems and invites public comment. This proposed revision results from the recent passage of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: a Legacy for Users (SAFETEA-LU) (Pub. L. 109-59, August 10, 2005), which also incorporates changes initiated in its predecessor legislation, the Transportation Equity Act for the 21st Century (TEA-21) (Pub. L. 105-178, June 9, 1998) and generally would make the regulations consistent with current statutory requirements. Interested parties are invited to send comments regarding all facets of this proposal.

DATES: Comments must be received on or before September 7, 2006.

ADDRESSES: Mail or hand deliver comments to the U.S. Department of Transportation, Dockets Management Facility, Room PL-401, 400 Seventh Street, SW., Washington, DC 20590, submit electronically at *http://dms.dot.gov* or fax comments to (202) 493-2251. Alternatively, comments may be submitted via the Federal eRulemaking Portal at *http://www.regulations.gov.* All comments should include the docket number that appears in the heading of this document. All comments received will be available for examination and copying at the above address from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a

self-addressed, stamped postcard or may print the acknowledgement page that appears after submitting comments electronically. Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). Persons making comments may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 53, Number 70, Pages 19477-78) or may visit *http://dms.dot.gov/.*

FOR FURTHER INFORMATION CONTACT: For the FHWA: Mr. Larry D. Anderson, Planning Oversight and Stewardship Team (HEPP-10), (202) 366-2374, Mr. Robert Ritter, Planning Capacity Building Team (HEPP-20), (202) 493-2139, or Ms. Diane Liff, Office of the Chief Counsel (HCC-10), (202) 366-6203. For the FTA: Mr. Charles Goodman, Office of Planning and Environment, (202) 366-1944, Ms. Carolyn Mulvihill, Office of Planning and Environment, (202) 366-2258, or Mr. Christopher VanWyk, Office of Chief Counsel, (202) 366-1733. Both agencies are located at 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m for FHWA, and 9 a.m. to 5:30 p.m. for FTA, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: Interested parties may submit or retrieve comments online through the Docket Management System (DMS) at *http://dms.dot.gov*. The DMS Web site is available 24 hours each day, 365 days each year. Follow the instructions online. Additional assistance is available at the help section of the Web site.

An electronic copy of this notice of proposed rulemaking may be downloaded using the Office of the Federal Register's Web page at: *http://www.archives.gov* and the Government Printing Office's Web page at: *http://www.gpoaccess.gov/index.html.*

Background

Statement of the Problem

The joint FHWA/FTA rules governing statewide and metropolitan transportation planning have remained unchanged since the agencies originally promulgated these rules on October 28, 1993 *(58 FR 58064)* in response to the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) (Pub. L. 102-240, December 18, 1991). Two statutory changes--the TEA-21 and the SAFETEA-LU--have occurred in the intervening years. The FHWA and the FTA, State Departments of Transportations (DOTs), Metropolitan Planning Organizations (MPOs), public transportation operators and the transportation community at large have evolved, and technology has improved. The proposed revisions would recognize the changes that have occurred in the last 12 years and bring the regulation up to date. We invite comments on all aspects of the proposed regulation, including the clarity of its requirements and any anticipated operational issues.

The existing rules have not been revised or amended since issuance in 1993, with two exceptions: The temporary waiver of certain metropolitan transportation planning and transportation conformity requirements for the New York City metropolitan area in response to the September 11, 2001, terrorist attacks *(67 FR 62373,* October 7, 2002), which has ended, and the requirement for States to establish, implement, and periodically review and revise a documented consultation process(es) with non-metropolitan local officials *(68 FR 3181,* January 23, 2003). The proposed regulations would not change the requirements related to State consultation with non-metropolitan local officials.

Section 1308 of the TEA-21 required the Secretary to eliminate the major investment study set forth in *Section 450.318 of title 23, Code of Federal R*egulations, as a separate requirement, and promulgate regulations to integrate such requirement, as appropriate, as part of the analyses required to be undertaken pursuant to the planning provisions of title 23, U.S.C. and title 49, U.S.C., Chapter 53 and the National Environmental Policy Act of 1969 (NEPA) for Federal-aid highway and transit projects. In addition, Section 3005 of SAFETEA-LU requires the Secretary to issue regulations setting standards for the Annual Listing of Projects required in *23 U.S.C. 134*(j)(7)(B) and *49 U.S.C. 5303*(j)(7)(B) as amended by SAFETEA-LU. The proposed regulations are intended to satisfy these requirements.

History

SAFETEA-LU. Section 6001 of the SAFETEA-LU amended *23 U.S.C. 134* and 135, to require a continuing, comprehensive, and coordinated transportation planning and programming process in metropolitan areas and States. Similar changes were made to *49 U.S.C. 5303*-5306 by sections 3005, 3006 and 3007 of the SAFETEA-LU, which address the [*33511] metropolitan and statewide transportation planning processes in the context of the FTA's responsibilities. Sec-

tion 1308 of TEA-21, which requires the Secretary of Transportation to eliminate the major investment study as a separate requirement and, as appropriate, integrate the requirement into the transportation planning and National Environmental Policy Act (NEPA) processes, was not changed by the SAFETEA-LU and remains in effect.

Prior Rulemaking. On May 25, 2000, the FHWA and the FTA jointly published a notice of proposed rulemaking (NPRM) in the **Federal Register** *(65 FR 33922)* proposing amendments to the existing metropolitan and statewide transportation planning regulations 23 CFR part 450 and 49 CFR part 613. Concurrently, the FHWA and the FTA jointly proposed to redesignate and amend existing regulations to further emphasize using the NEPA process to facilitate effective and timely transportation planning decisionmaking *(65 FR 33959,* May 25, 2000). The metropolitan and statewide transportation planning and NEPA NPRMs were issued concurrently to further the goal of the FTA and the FHWA to better coordinate the planning processes with project development activities and decisions associated with the NEPA process. On July 7, 2000 *(65 FR 41891),* a supplemental notice was published to extend the comment period on both NPRMs until September 23, 2000.

More than 400 documents (representing slightly more than 300 discrete comments) were submitted to that docket, distributed relatively equally among three primary sources: State DOTs, MPOs, and various other transportation stakeholder groups.

During the comment period, the U.S. Senate Committee on Environment and Public Works and the U.S. House Committee on Transportation and Infrastructure held hearings regarding the NPRMs on September 12 and 13, 2000, respectively, focused on the intent of TEA-21 and possible burdens on State DOTs and MPOs that would not, it was asserted, result in increased efficiency and effectiveness of the planning or project development processes.

In response to the number, extent, and nature of the concerns, as well as in anticipation of further imminent statutory guidance (although, as it turned out, the SAFETEA-LU would not be enacted until 2005), the FHWA and FTA issued a notice in the September 20, 2002, **Federal Register** *(67 FR 59219)* withdrawing the NPRM. n1

n1 The FHWA and the FTA proceeded with a separate rulemaking effort to address the issue of State consultation with non-metropolitan local officials. A final rule on that issue was published January 23, 2003 *(68 FR 3181).*

In the years since the May 2000 NPRM, transportation planning has continued to evolve. For example, the 2000 census identified increased urbanization, requiring the designation of additional metropolitan areas and establishment of additional MPOs and new Transportation Management Areas (TMAs). The TEA-21 provided increased funds for transportation planning. Improved technologies such as Geographic Information Systems (GIS), the proliferation of Internet use, and improved data collection and processing have allowed planners to analyze more data and provide new ways to share information. New partners, such as freight carriers and shippers, are engaged in the process. The nation increasingly competes in a global economy, with greater emphasis on the need to move freight efficiently, and a greater recognition for the need to maximize the use and efficiency of the existing transportation system. The planning regulations need to be updated to respond to these and other related changes, as well as to the new statutory mandates of the SAFETEA-LU.

Interim Guidance

After withdrawing the NPRM, the FHWA and the FTA developed and issued a number of guidance documents to provide direction to State DOTs, MPOs and public transportation operators in implementing the TEA-21 statutory provisions. These are summarized below:

On February 2, 2001, the FHWA and the FTA jointly issued "Implementing TEA-21 Planning Provisions", n2 which provided information on how to proceed with the TEA-21 statutory planning requirements, noting that "Although new planning regulations have not been issued, the requirements in TEA-21 are in effect." Under this guidance, the FHWA and the FTA field offices were to work with MPOs, State DOTs, and transit operators "to ensure a basic level of compliance with TEA-21 planning requirements, based on the statutory language." The guidance focused on the following new TEA-21 requirements: (a) Annual listing of projects; (b) revenue estimates for transportation plans and TIPs; (c) State consultation with local officials in non-metropolitan areas; (d) consultation with transit users and freight shippers and service providers; (e) MIS integration; (f) Federal planning finding for STIP approvals; (g) consolidation of planning factors; and (h) public involvement during certification reviews. These requirements continue, some enhanced, in SAFETEA-LU.

n2 This joint guidance is available via the Internet at the following URL:*http://www.fhwa.dot.gov/hep/tea21mem.htm.*

Subsequently, on February 22, 2005, the FHWA and the FTA issued joint "Program Guidance on Linking the Transportation Planning and NEPA Processes." n3 This guidance, developed for use by State DOTs, MPOs, and public transportation operators, summarized and further explained provisions in current law and regulation, and provided direction on how information, analysis, and products from metropolitan and statewide transportation planning processes (pursuant to *23 U.S.C. 134*-135 and *49 U.S.C. 5303*-5306) could be incorporated into and relied upon in the NEPA process under existing Federal statutes and regulations. This guidance is included in this proposal as Appendix A to part 450. A companion legal analysis outlining authority under current law was also issued on February 22, 2005. n4 Appendix A reiterates the statutory provision that transportation plans and programs are exempt from NEPA review. Development of Appendix A involved outreach to key national transportation planning stakeholder groups (American Association of State Highway and Transportation Officials (AASHTO), the Association of Metropolitan Planning Organizations (AMPO), the National Association of Regional Councils (NARC), the American of Public Transportation Association (APTA), and the Surface Transportation Policy Project (STPP) as well as Federal environmental, regulatory, and resource agencies.

n3 This joint guidance is available via the Internet at the following URL: *http://nepa.fhwa.dot.gov/ ReNepa/ReNepa. nsf/aa5aec9f63be 385c852568cc 0055ea16/ 9fd918150ac2449 685256fb10050726c? OpenDocument.*

n4 This joint guidance is available via the Internet at the following URL:*http://nepa. fhwa.dot.gov/renepa/renepa. nsf/All+Documents/ 9FD918150AC2449685256FB10050726C /$ FILE/Planning-NEPA%20guidance,%20legal,%20 final,%202-22-05.doc or http://nepa. fhwa.dot.gov/ renepa/renepa. nsf/All+ Documents/9FD918150AC 2449685256FB10050726C/$ FILE/ Planning-NEPA%20guidance,%20legal, %20final, %202- 22-05.pdf.*

On March 10, 2005, the FHWA issued a memorandum on Wetland and Natural Habitat Mitigation that emphasized that wetland and natural habitat mitigation measures, such as wetland and habitat banks or statewide and regional [*33512] conservation measures, are eligible for Federal-aid participation when they are undertaken to create mitigation resources for future transportation projects. In its memorandum, the FHWA clarified that, to provide for wetland or other mitigation banks, the State DOT and the FHWA Division Office should identify potential future wetlands and habitat mitigation needs for a reasonable time frame and establish a need for the mitigation credits. The transportation planning process should guide the determination of future mitigation needs. (*See http://www.fhwa. dot.gov/environment/ wetland/ wethabmitmem.htm.*) The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) have also announced proposed revisions to regulations governing compensatory mitigation for authorized impacts to wetlands, streams, and other waters of the U.S. under Section 404 of the Clean Water Act. (*See 71 FR 15520* (March 28, 2006).) These revisions are designed to improve the effectiveness of compensatory mitigation at replacing lost aquatic resource functions and area, expand public participation in compensatory mitigation decision-making, and increase the efficiency and predictability of the process of proposing compensatory mitigation and approving new mitigation banks.

On March 30, 2005, the FHWA and the FTA issued joint "Guidance on Designation and Redesignation of MPOs." n5 This guidance, designed to address inconsistencies that existed between *23 U.S.C. 134, 49 U.S.C. 5303,* and 23 CFR Part 450 regarding the designation and redesignation of MPOs, provided clarifying information and illustrative examples of scenarios that do and do not trigger MPO redesignations, based on several actual events that transpired since the enactment of TEA-21.

n5 This joint guidance is available via the Internet at the following URL: *http://www.fhwa.dot.gov/ planning/mpodes.htm.*

On April 12, 2005, the FHWA and the FTA jointly issued "Planning Horizons for Metropolitan Long Range Transportation Plans." n6 This guidance provided updated and clarified information on the "planning horizon" requirement for metropolitan long-range transportation plans. The guidance required that metropolitan long-range transportation plans (*see 23 CFR 450.322(a)*) shall address "at least a 20-year planning horizon." Furthermore, the guidance allowed the FHWA and the FTA to take actions on STIPs/TIPs and associated amendments or transportation conformity determinations with an MPO long-range transportation plan initially adopted with a minimum 20-year planning horizon. However, if the long-range transportation plan is amended to add, delete, or significantly change a regionally significant project (in any metropolitan area), the transportation plan's horizon should be at least 20 years at the time of the MPO action.

n6 This joint guidance is available via the Internet at the following URL: *http://www.fhwa.dot.gov/planning/planhorz.htm.*

On June 30, 2005, the FHWA and the FTA jointly issued "Guidance on Fiscal Constraint for STIPs, TIPs, and Metropolitan Plans." n7 This guidance summarized and described in detail the ISTEA and TEA-21 fiscal constraint requirements to ensure that transportation plans and programs reflect realistic assumptions on capital, operations, and maintenance costs associated with the surface transportation system. This guidance is included in this proposal as Appendix B to Part 450.

n7 This joint guidance is available via the Internet at the following URL: *http://www.fhwa.dot.gov/planning/fcindex.htm.*

On September 2, 2005, the FHWA and the FTA jointly issued "Interim Guidance for Implementing Key SAFETEA-LU Provisions on Planning, Environment, and Air Quality for Joint FHWA/FTA Authorities." n8 This guidance was issued after the enactment of the SAFETEA-LU to inform the FHWA and the FTA field offices on how to implement SAFETEA-LU provisions. related to transportation planning, air quality, and environment. This guidance established the following interim implementation schedule and requirements: (a) Statewide and metropolitan transportation plans and programs under development at the time of SAFETEA-LU enactment could be completed under TEA-21 requirements and schedules; (b) transportation plans and programs adopted after July 1, 2007, must comply with all the SAFETEA-LU planning provisions; (c) States or MPOs opting to implement the SAFETEA-LU requirements prior to July 1, 2007, must satisfy all the SAFETEA-LU provisions prior to adoption of transportation plans and programs; and (d) FHWA/FTA certifications of Transportation Management Areas (TMAs) would be extended to four years (except for any existing "conditional" certifications, which must be completed as previously scheduled).

n8 This joint guidance is available via the Internet at the following URL: *http://www.fhwa.dot.gov/hep/igslpja.htm.*

Development of the Proposed Regulation

The proposed revised regulations reflect the requirements of the SAFETEA-LU, including requirements first mandated in the TEA-21. To implement these legislative mandates, we have adhered closely to the statutory language in drafting the regulation. Over time, and as necessary, the FHWA and FTA will continue to issue additional guidance and disseminate information on noteworthy practices.

Approach to Structure of Proposed Regulation

While the statutory changes resulting from the SAFETEA-LU form a large basis for the proposed regulation, several pre-existing regulatory provisions not specifically mentioned in the SAFETEA-LU remain relevant for carry over into the new rule. The statute alone does not fully present all the connections between various regulatory provisions nor define program stewardship and oversight mechanisms. Oversight mechanisms such as FHWA/FTA certification reviews of TMAs and the FHWA/FTA planning finding to support approval of the STIP have been effectively used to ensure compliance and to add value for promoting continuous improvement in the statewide and metropolitan transportation planning process.

Close adherence to the legislative mandate, described in "Key Statutory Changes" below, and further highlighted in the "Section by Section Discussion," means that additional regulatory language was generally not included in the revised regulation if it expanded significantly on legislative language. In some cases, which will be noted below, other factors, such as court decisions or Presidential directives, required change and amplification. In these instances, however, we have tried to keep supplemental, non-statutory language to a minimum in the proposed regulations, except where clarification would assist compliance. In most cases, State DOTs, MPOs, transportation stakeholders, and the public are familiar and experienced in using existing practices.

We also propose to clarify and revise the regulation's section headings to use plainer language, as described below. The organization of each section and general structure reflects, mostly unchanged, the existing regulation, except as indicated in the "Section by Section Discussion".

The FHWA and FTA have conducted routine coordination/outreach activities with major transportation stakeholders, [*33513] including regular participation in national and regional conferences and meetings on transportation planning issues, that provided important insight and perspective on the transportation planning process. In addition to these meetings, the FHWA and the FTA met with transportation stakeholder organizations as appropriate to understand the state-of-the-practice of transportation planning and recent or emerging policy concerns, identify noteworthy practices, and highlight outstanding transportation planning initiatives. Through programs such as the Transportation Planning Capacity Building Program, n9 the FHWA and the FTA have reached out to the transportation planning commu-

nity to provide technical assistance and technology transfer and strengthen the transportation planning processes. Further, the FHWA and the FTA have worked with State DOTs, MPOs, and public transportation operators through their professional associations to discuss proposed guidance and statutory changes, and to implement improvements to the transportation planning process.

n9 The Transportation Planning Capacity Building (TPCB) Program is a collaborative effort of FHWA and the FTA with various public and private organizations. Broadly speaking, it exists to help State and local transportation staff meet their complex political, social, economic, and environmental demands. On a practical level, the TPCB Program provides information, training, and technical assistance to help transportation professionals create plans and programs that respond to the needs of the many users of their local transportation systems.

In developing the regulation, the knowledge we have gained regarding concerns and operations of our program stakeholders has assisted our understanding of the effect of both statute and regulations in a real world environment, enabled us to anticipate and address stakeholders' issues and concerns, and has made us attentive to the need to issue and administer regulations that are flexible to apply across the United States. For example, we propose retaining the existing rule language on separate and discrete State consultation processes with non-metropolitan local officials based on stakeholders' past concerns.

These proposed rules were developed by an interagency and multidisciplinary task force of transportation planners, engineers and environmental specialists of the FHWA and the FTA, with input from other Federal agencies and components of the Office of the Secretary of Transportation. The task force reviewed legislation and input received from partners and stakeholders. In addition, comments were solicited from the field staffs of the FHWA and the FTA.

Key Statutory Changes

Although substantial portions of the SAFETEA-LU sections 3005, 3006, and 6001 mirror previous law, there are several key statutory changes and new requirements, summarized below:

Metropolitan Planning

New Planning Factor: Security and safety of the transportation system are stand-alone planning factors, signaling an increase in importance from prior legislation, in which security and safety were coupled in the same planning factor. *(23 U.S.C. 134*(h)(1)(C) and *49 U.S.C. 5303*(h)(1)(C).

Expanded Planning Factor: The TEA-21 planning factor related to environment was expanded to include "promote consistency between transportation improvements and State and local planned growth and economic development patterns." *(23 U.S.C. 134*(h)(1)(E) and *49 U.S.C. 5303*(h)(1)(E)).

Metropolitan Transportation Plans: The requirement for metropolitan transportation plans to cover a 20-year minimum plan horizon at the time of adoption is maintained. The SAFETEA-LU statutorily established time frames for updating metropolitan transportation plans. For air quality nonattainment and maintenance areas, transportation plans shall be updated at least every four years (compared to a three-year update cycle in the regulations implementing ISTEA). The requirement for attainment area MPOs to update transportation plans at least every five years remains unchanged from the regulations.

Environmental Mitigation Activities in Metropolitan Transportation Plans: Metropolitan transportation plans shall include a discussion of potential environmental mitigation activities, to be developed in consultation with Federal, State and Tribal wildlife, land management, and regulatory agencies. *(23 U.S.C. 134*(i)(2)(B) and *49 U.S.C. 5303*(i)(2)(B)).

New Consultations: MPOs shall consult "as appropriate" with "State and local agencies responsible for land use management, natural resources, environmental protection, conservation, and historic preservation" in developing metropolitan transportation plans *(23 U.S.C. 134*(i)(4) and *49 U.S.C. 5303*(i)(4)).

Participation Plan: MPOs must develop and utilize a "Participation Plan" that provides reasonable opportunities for interested parties to comment on the content of the metropolitan transportation plan and metropolitan TIP. Further, this "Participation Plan" must be developed "in consultation with all interested parties." *(23 U.S.C. 134*(i)(5)(B) and *49 U.S.C. 5303*(i)(5)(B)).

Congestion Management Processes in Transportation Management Areas (TMAs): Within a metropolitan planning area serving a TMA, there must be "a process that provides for effective management and operation" to address congestion management *(23 U.S.C. 134*(k)(3)) and *49 U.S.C. 5303*(k)(3)).

Operational and Management Strategies in Transportation Plans: Metropolitan transportation plans shall include operational and management strategies to improve the performance of the existing transportation facilities to relieve vehicular congestion and maximize the safety and mobility of people and goods *(23 U.S.C. 134*(i)(2)(D)) and *49 U.S.C. 5303*(i)(2)(D)).

TIP Cycles and Scope: TIPs are to be updated at least every four years (compared to at least every two years in ISTEA and TEA-21). In addition, TIPs must include projects covering four years (compared to three years in ISTEA and TEA-21) *(23 U.S.C. 134*(j)(1)(D) and 134(j)(2)(A) and *49 U.S.C. 5303*(j)(1)(D) and 5303(j)(2)(A)).

Visualization Techniques in Metropolitan Transportation Plan and TIP Development: As part of transportation plan and TIP development, MPOs shall employ visualization techniques to the maximum extent practicable *(23 U.S.C. 134*(i)(5)(C)(ii) and *49 U.S.C. 5303*(i)(5)(C)(ii)).

Publication of the Metropolitan Transportation Plan and TIP: MPOs shall publish or otherwise make available for public review transportation plans and TIPs "including (to the maximum extent practicable) in electronically accessible formats and means, such as the World Wide Web" *(23 U.S.C. 134*(i)(6) and *49 U.S.C. 5303*(i)(6) on transportation plans and *23 U.S.C. 134*(j)(7)(a) and *49 U.S.C. 5303*(j)(7)(a) on TIPs).

Annual Listing of Obligated Projects: This TEA-21 requirement is retained, but the development of the annual listing "shall be a cooperative effort of the State, transit operator, and MPO." For clarity, two new project types (investments in pedestrian walkways and bicycle transportation facilities) for which Federal funds have been obligated in the preceding year in the metropolitan planning area are emphasized *(23 U.S.C. 134*(j)(7)(B) and *49 U.S.C. 5303*(j)(7)(B)).

TMA Certification Cycle: FHWA/FTA must certify each TMA planning process [*33514] at least every four years (compared to every three years in ISTEA and TEA-21) *(23 U.S.C. 134*(k)(5)(A)(ii) and *49 U.S.C. 5303*(k)(5)(A)(ii)).

Strategic Highway Safety Plan (SHSP): State must develop a strategic highway safety plan that identifies and analyzes safety problems and opportunities in order to use Highway Safety Improvement Program funds for new eligible activities under *23 U.S.C. 148.*

Coordinated Public Transit-Human Services Transportation Plan: Sections 3012, 3018, and 3019 of the SAFETEA-LU require that proposed projects under three FTA formula funding programs (Special Needs of Elderly Individuals and Individuals with Disabilities *(49 U.S.C. 5310*(d)(2)(B)(i) and (ii)); Job Access and Reverse Commute *(49 U.S.C. 5316*(g)(3)(A) and (B)); and New Freedom *(49 U.S.C. 5317*(f)(3)(A) and (B)) must be derived from a locally developed public transit-human services transportation plan. This plan must be developed through a process that includes representatives of public, private, and non-profit transportation and human services providers, as well as the public. And, an areawide solicitation for applications for grants under the latter two programs above shall be made in cooperation with the appropriate MPO.

Statewide Planning

New Planning Factor: Security and safety of the transportation system are stand-alone planning factors, signaling an increase in importance from prior legislation, in which security and safety were in the same planning factor *(23 U.S.C. 135*(d)(1)(C) and *49 U.S.C. 5304*(d)(1)(C)).

Expanded Planning Factor: The TEA-21 planning factor related to environment was expanded to include "promote consistency between transportation improvements and State and local planned growth and economic development patterns" *(23 U.S.C. 135*(d)(1)(E) and *49 U.S.C. 5304*(d)(1)(E)).

Environmental Mitigation Activities in Long-Range Statewide Transportation Plans: Long-range statewide transportation plans shall include a discussion of potential environmental mitigation activities, to be developed in consultation with Federal, State and Tribal wildlife, land management, and regulatory agencies *(23 U.S.C. 135*(f)(4) and *49 U.S.C. 5304*(f)(4)).

New Consultations: States shall consult "as appropriate" with "State, local, and Federally-recognized Tribal agencies responsible for land use management, natural resources, environmental protection, conservation, and historic pres-

ervation" in developing the long-range statewide transportation plan *(23 U.S.C. 135*(f)(2)(D) and *49 U.S.C. 5304*(f)(2)(D)).

STIP Cycles and Scope: STIPs are to be updated at least every four years (compared to at least every two years in ISTEA and TEA-21). In addition, STIPs must include projects covering four years (compared to three years in the ISTEA and the TEA-21) *(23 U.S.C. 135*(g)(1) and *49 U.S.C. 5304*(g)(6)).

Visualization Techniques in Long-Range Statewide Transportation Plan Development: States shall employ visualization techniques in the development of the Long-Range Statewide Transportation Plan to the maximum extent practicable *(23 U.S.C. 135*(f)(3)(B)(ii) and *49 U.S.C. 5304*(f)(3)(B)(ii)).

Publication of the Long-Range Statewide Transportation Plan: States shall publish or otherwise make available for public review the long-range statewide transportation plan "including (to the maximum extent practicable) in electronically accessible formats and means, such as the World Wide Web" *(23 U.S.C. 135*(f)(8) and *49 U.S.C. 5304*(f)(8)).

Strategic Highway Safety Plan (SHSP): State must develop a strategic highway safety plan that identifies and analyzes safety problems and opportunities in order to use Highway Safety Improvement Program funds for new eligible activities under *23 U.S.C. 148.*

State Highway Safety Improvement Program Projects in the STIP: Projects or strategies contained in the State highway safety improvement program from the State strategic highway safety plan must be consistent with the requirements of the STIP *(23 U.S.C. 148*(a)(5)).

Indian Reservation Road Projects in the STIP: "Funds available to Indian tribes for Indian reservation roads shall be expended on projects identified in a transportation improvement program approved by the Secretary" *(23 U.S.C. 202).*

Section-by-Section Discussion

Subpart A--Transportation Planning and Programming Definitions

Section 450.100 Purpose

Existing § 450.100 would be largely retained.

Section 450.102 Applicability

Existing § 450.102 would be retained without change.

Section 450.104 Definitions

Existing § 450.104 would be retained, with terms and definitions, as follows.

We propose a definition for "administrative modification" to describe a type of revision to a long-range statewide or metropolitan transportation plan, TIP or STIP that is not significant enough to require public review and comment, redemonstration of fiscal constraint, or a conformity determination (in nonattainment and maintenance areas). This term, along with "amendment" are the two types of "revisions."

"Alternatives analysis" would be defined to reflect the FTA's Capital Investment Grant Program *(49 U.S.C. 5309).*

We propose a definition for "amendment" to describe a type of revision to a long-range statewide or metropolitan transportation plan, TIP, or STIP that is significant enough to require public review and comment, redemonstration of fiscal constraint, or a conformity determination (in nonattainment and maintenance areas). This term, along with "administrative modification" are the two types of "revisions."

"Attainment area" would be defined as reflected in the Transportation Conformity Reference Guide. n10

n10 The Transportation Conformity Reference Guide is available via the Internet at *http://www.fhwa.dot.gov/environment/conformity/ref-guid/coverpag.htm.*

We propose to include "available funds" and "committed funds" based on the FHWA/FTA Interim Guidance on Fiscal Constraint. n11

n11 Interim FHWA/FTA Guidance on Fiscal Constraint for STIPs, TIPs, and Metropolitan Plans (issued on June 30, 2005) available on the internet at *http://www.fhwa.dot.gov/planning/fcindex.htm.*

"Conformity," and "conformity lapse" would be defined as reflected in the Clean Air Act, as amended *(42 U.S.C. 7401 et seq.*).

We propose a definition for "congestion management process" to reflect the SAFETEA-LU language.

We propose a definition for "consideration" to reflect a basic level of attention to other planning issues, as opposed to more substantial review under "consultation" and "cooperation," in preparing transportation plans and programs.

"Consultation" would remain largely unchanged, with minor revisions to reflect that consultation may occur between more than two parties.

"Cooperation" would be slightly revised to reflect current legislation and practice.

"Coordinated public transit-human service transportation plan" would be defined to reflect *49 U.S.C. 5316*(g)(3).

"Coordination" would be slightly revised to reflect current legislation and practice. [*33515]

"Design concept" and "design scope" would be defined as reflected in the EPA's transportation conformity rule at *40 CFR 93.101*.

We propose to include definitions of: "environmental mitigation activities," "Federal land management agency," "Federally funded non-emergency transportation services," "financially constrained" or "fiscal constraint," "financial plan," and "freight shippers".

The definition of "Governor" would be retained.

"Illustrative project" would be added to reflect new legislative provisions from the TEA-21 and *23 U.S.C. 134*(i)(2)(C) and 135(f)(5) and *49 U.S.C. 5303*(i)(2)(C) and 5304(f)(5).

"Indian Tribal government" would be added based on the Federally Recognized Indian Tribe List Act of 1994 *(25 U.S.C. 479a-1).*

"Intelligent transportation systems (ITS)" would be added to reflect new legislative provisions from the TEA-21 and *23 U.S.C. 134*(h)(1)(A) and *23 U.S.C. 135*(d)(A) and *49 U.S.C. 5304*(d)(A) and *49 U.S.C. 5309*(e)(10)(B).

We propose to include definitions of: "interim metropolitan transportation plan" and "interim transportation improvement program".

"Long-range statewide transportation" would be slightly revised and renamed from the former "statewide transportation plan" to reflect new statutory language from *23 U.S.C. 135*(f) and *49 U.S.C. 5304*(f).

"Maintenance area" would be revised to reflect the EPA definition used in the conformity regulation at 40 CFR part 93.101.

"Major metropolitan transportation investment" would be removed to reflect the legislative provision from Section 1308 of the TEA-21.

"Management system" would be retained in consideration of their extensive use by States, although the requirement for maintaining them was eliminated by legislative changes in the National Highway System Designation Act of 1995 (Pub. L. 104-59; November 28, 1995).

"Metropolitan planning area" (MPA) and "metropolitan planning organization" (MPO) would be revised to reflect legislative changes in *23 U.S.C. 134*(b) and *49 U.S.C. 5303*(b). Importantly, the term "MPO" refers to the policy board for the organization that is designated under *23 U.S.C. 134* and *49 U.S.C. 5303.*

"Metropolitan transportation plan" would remain unchanged, except for legislative references.

"National Ambient Air Quality Standards" would be defined, using legislative language from the Clean Air Act *(42 U.S.C. 7401 et seq*).

"Nonattainment area" would remain unchanged, except for legislative references.

"Non-metropolitan area" and "non-metropolitan local official" would remain unchanged.

A definition is proposed for "operational and management strategies" to reflect the legislative policy directions from the SAFETEA-LU.

We propose to add definitions for the terms "obligated projects," and "project selection".

"Provider of freight transportation services" would be added as described for freight-related industries in the Transportation Warehousing Sector 48-49 of the North American Industrial Classification System.

We propose to add a definition for "regional ITS architecture," as set forth in the National ITS Architecture Consistency Policy for Transit Projects (Number C-01-03) and FHWA regulations on ITS architecture and standards (23 CFR parts 655 and 940).

The definition of "regionally significant project" would be retained, with some clarifying revisions.

We propose a definition for "Regional Transit Security Strategy" that is aligned with the concept required by the Department of Homeland Security.

We propose a definition for "revision" that describes a change to a long-range statewide or metropolitan transportation plan, TIP, or STIP that occurs between scheduled periodic updates. A revision may or may not be significant. A significant revision is defined as an "amendment" (see above), while a non-significant revision is defined as an "administrative modification" (see above).

"State" would be unchanged.

The definition of "State implementation plan" would be retained, with some clarifying revisions.

"Statewide transportation improvement program" would be unchanged.

"Strategic highway safety plan" would be defined consistent with *23 U.S.C. 148*(b)(6), as amended by the SAFETEA-LU.

"Transportation control measure" would be defined, as reflected in U.S. EPA's transportation conformity rule at 40 CFR part 93.101.

"Transportation improvement program" would be revised slightly.

"Transportation management area" (TMA) would be slightly changed, particularly to change the provision in which the TMA designation formerly applied to the entire metropolitan planning area(s).

"Unified planning work program" would be defined.

We propose a definition for "update" that applies to a complete change to a long-range statewide or metropolitan transportation plan, TIP, or STIP that occurs on a regular schedule as prescribed by Federal statute. Updates always require public review and comment, demonstration of fiscal constraint (except for long-range statewide transportation plans), and a conformity determination (in nonattainment and maintenance areas).

"Urbanized area" would be defined, consistent with recent statutory changes in *23 U.S.C. 134*(b).

We propose to add definitions for the terms "users of public transportation" and "visualization techniques."

Subpart B--Statewide Transportation Planning and Programming

Section 450.200 Purpose

The statement of purpose in § 450.200 would be slightly revised to better reflect the policy statement contained in *23 U.S.C. 135* and *49 U.S.C. 5304*. The proposed revision would support strengthened linkages between statewide and metropolitan transportation planning, and include a specific reference to "accessible pedestrian walkways and bicycle facilities."

Section 450.202 Applicability

Existing § 450.202 would be revised to specifically include MPOs and public transportation operators within the statewide transportation planning process and to add *23 U.S.C. 135* and *49 U.S.C. 5304* as a statutory citation.

Section 450.204 Definitions

Existing § 450.204 would remain the same, except for the addition of *49 U.S.C. 5302* as a statutory citation.

Section 450.206 Scope of the Statewide Transportation Planning Process

For purposes of simplification, a majority of the content of existing § 450.206 would be removed or relocated to other sections due to outdated or redundant information and the section would be re-titled. Proposed § 450.206(a) would revise the content in existing § 450.208(a) by replacing the ISTEA planning factors with the eight planning factors in *23 U.S.C. 135*(d)(1) and *49 U.S.C. 5304*(d)(1). See "Key Statutory Changes" above. The planning factors are based on the language in the statute, with the exception of minor amplification of the factor on "security." [*33516]

In § 450.206(b) we propose to provide general information on the use of and application of the eight planning factors throughout the statewide transportation planning process.

In paragraph (c) what we propose is consistent with the language in *23 U.S.C. 135*(d)(2) and *49 U.S.C. 5304*(d)(2) that the failure to consider any of the factors shall not be reviewable by any court in any matter affecting a long-range statewide transportation plan, Statewide transportation improvement program (STIP), or FHWA/FTA planning process findings.

In paragraph (d) we propose to re-locate and revise the information and statutory references in existing § 450.218 (Funding). In addition, this proposed paragraph would establish the statewide planning work program required by 23 CFR part 420 (for funds under 23 U.S.C. and 49 U.S.C.) as the primary tool to discuss the planning priorities of the State.

Section 450.208 Coordination of Planning Process Activities

Existing § 450.210 would be redesignated as § 450.208. Paragraph (a) would be revised to focus on required planning coordination efforts as defined in *23 U.S.C. 135*(b)(1) and 135(e) and *49 U.S.C. 5304*(b)(1) and *49 U.S.C. 5304*(e) to reflect the simplification of language provided by the change in planning factors.

A new paragraph (b) is proposed to address the *23 U.S.C. 135*(b)(2) and *49 U.S.C. 5304*(b)(2) requirement for the statewide transportation planning process to be coordinated with air quality planning conducted by State air quality agencies in the development of the transportation portion of the State Implementation Plan (SIP).

A new paragraph (c) is proposed to reflect the *23 U.S.C. 135*(c)(1) and *49 U.S.C. 5304*(c)(1) provision allowing two or more States to enter into agreements or compacts for cooperative efforts and mutual assistance regarding multi-State transportation planning activities. This paragraph would note that the U.S. Congress reserves the right to alter, amend, or repeal interstate compacts entered into under this part.

Paragraph (d) would retain existing rule language providing States the option to use any one or more of the management systems (in whole or in part) under 23 CFR part 500 for purposes of carrying out the statewide transportation planning process.

Paragraph (e) is proposed to encourage States to apply asset management principles and techniques in establishing planning goals, defining STIP priorities, and assessing transportation investment decisions to include transportation system safety, operations, preservation, and maintenance.

Paragraph (f) is proposed to ensure that statewide transportation planning processes are carried out in a manner consistent with regional Intelligent Transportation System (ITS) architectures in 23 CFR part 940 (based on the ITS consistency requirement in section 5206(e) of the TEA-21).

Paragraph (g) is proposed to address the need for transportation planning processes to be consistent with the development of Public Transit-Human Services Transportation Plans, as defined in *49 U.S.C. 5310,* 5316, and 5317.

Paragraph (h) is proposed to promote consistency between the statewide transportation planning process and the Strategic Highway Safety Plan, as specified in *23 U.S.C. 148,* as well as with the Regional Transit Security Strategy, as required by the Department of Homeland Security.

Section 450.210 Interested Parties, Public Involvement, and Consultation

Existing § 450.212 would be revised, re-titled, and redesignated as § 450.210. Overall, existing § 450.212 (Public Involvement) would be broadened to focus on all facets of participation and consultation in the statewide transportation planning process, including the involvement of "interested parties" (as defined by *23 U.S.C. 135*(f)(3)(A) and *49 U.S.C. 5304*(f)(3)(A)) and State consultation with non-metropolitan local officials, Indian Tribal governments, and the Secretary of the Interior. See "Key Statutory Changes" above.

Proposed paragraph (a) would continue the requirement for State public involvement processes that include the "interested parties" defined under *23 U.S.C. 135*(f)(3)(A) and *49 U.S.C. 5304*(f)(3)(A). Proposed paragraph (a)(1)(ix) provides for periodic State evaluation of its public involvement procedures. The FHWA and the FTA believe that the periodic assessment of such processes, including the voluntary development and use of public involvement process performance criteria, can help to determine that the effort is well spent and help adjust and respond to changes over time.

Proposed paragraph (a)(2) would require States to provide for public comment on existing and proposed procedures for public involvement in the development of the long-range statewide transportation plan and the STIP, allowing at least 45 days for public review and written comment before the procedures and any amendment to existing procedures are adopted.

Proposed paragraph (b) would retain the content in current § 450.212(h) regarding State development of a documented process(es) that is separate and discrete from the State's public involvement process for consulting with non-metropolitan local officials representing units of general purpose local government and/or local officials responsible for transportation. In addition, proposed paragraph (b)(1) would retain the content in existing § 450.212(i) on the periodic review (at least once every five years) of the effectiveness of the consultation process(es), including the solicitation of comments (for a period of at least 60 days) from non-metropolitan local officials and other interested parties, and the consideration of these comments by the State in modifying the process(es). Per the existing regulation, the five year review cycle begins February 24, 2006. The existing regulation allowed one year to implement the consultation process after the regulation was published *(68 FR 3181,* January 23, 2003), established an initial review after two years, and every five years thereafter.

Proposed paragraph (c) focuses on State consultation with Indian Tribal governments and the Secretary of Interior in the development of the long-range statewide transportation plan and the STIP, reflecting the language and intent articulated in *23 U.S.C. 135*(f)(2)(C) and 135(g)(2)(C) and *49 U.S.C. 5304*(f)(2)(C) and 5304(g)(2)(C). This proposed paragraph also encourages States, as appropriate, to develop a documented process(es) that outlines roles, responsibilities, and key decision points for consulting with Indian Tribal governments and Federal land management agencies in the development of the long-range statewide transportation plan and the STIP. The FHWA and the FTA believe that a documented process(es) would provide for greater understanding between States and Indian Tribal governments and Federal land management agencies on how this consultation would occur. The FHWA and the FTA recognize an obligation and requirement for Federal government consultation with Indian Tribes, in addition to State consultation with Tribes. [*33517]

Section 450.212 Transportation Planning Studies and Project Development

Section 1308 of the TEA-21 eliminated the major MIS as a separate requirement and called for the Secretary to integrate, as appropriate, the remaining aspects and features of the MIS (and associated corridor or subarea studies) into the transportation planning and the NEPA regulations.

Since 1998, the FHWA and the FTA (in cooperation with Federal, environmental, resource, and regulatory agencies) have undertaken several initiatives to promote strengthened linkages between the transportation planning and project development/NEPA processes under existing legislative, statutory, and regulatory authorities. In particular, on February 22, 2005, the FHWA and the FTA disseminated legal analysis and program guidance entitled "Linking the Transportation Planning and NEPA Processes." n12 Although voluntary to States, MPOs, and public transportation operators, this program guidance was intended to articulate how information, analysis, and products from metropolitan and statewide transportation planning processes could be incorporated into and relied upon in the NEPA process under existing Federal statutes and regulations.

n12 This guidance document is available via the Internet at *http://nepa. fhwa.dot.gov/ ReNepa/ReNepa.nsf/aa5aec9f63be385c852568cc0055ea16/9fd918150ac2449685256fb10050726c? OpenDocument* and is included as Appendix A.

Proposed § 450.212 is structured around the guiding principles and legal opinion reflected in the program guidance.

Section 450.214 Development and Content of the Long-range Statewide Transportation Plan

Existing § 450.214 would be re-titled. Consistent with existing § 450.214, proposed § 450.214 would maintain the opportunity for the long-range statewide transportation plan to be comprised of policies and/or strategies, not necessarily specific projects, over the minimum 20-year forecast period. In addition, proposed paragraph (n) would retain State discretion to identify a periodic schedule for updating the long-range statewide transportation plan and to revise the plan as necessary. The FHWA and the FTA recognize that changes to transportation plans between formal update cycles may be necessary. We have proposed definitions for the terms "administrative modification," "amendment," and "revision" to clarify these actions.

Proposed § 450.214 also would be revised to reflect key provisions in *23 U.S.C. 135*(d)(1)(G) and 135(d)(1)(H) and *49 U.S.C. 5304*(d)(1)(G) and 5304(d)(1)(H). Proposed paragraph (b) calls for the long-range statewide transportation plan to include capital, operations, and management strategies, investments, procedures, and other measures to ensure the preservation of the existing transportation system.

The FHWA and the FTA believe improved planning for the operations and management of the Nation's transportation system is vitally important to continuing to deliver the safety, reliability, and mobility for people and freight in the 21st century that the nation expects. Operations and management (or management and operations) is a coordinated approach to optimizing the performance of existing infrastructure and building operational capacity into new projects through the implementation of multimodal, intermodal, and often cross-jurisdictional systems, services, and projects. To be effective, management and operations must be a collaborative effort between transportation planners and managers with responsibility for day-to-day transportation operations. Management and operations refers to a broad range of strategies, such as traffic detection and surveillance, work zone management, emergency management, and traveler information services. It also refers to strategies that address the economically critical area of goods movement, such as improving intermodal connections and designing and operating key elements of the transportation system to accommodate the patterns and dynamics of freight operations. Such strategies enhance reliability and goods movement efficiency; improve public safety and security; support homeland security and safeguard the personal security; reduce traveler delays associated with incidents and other events; and improve information for businesses and for the traveling public.

In order to draw a strong link between the Strategic Highway Safety Planning process described in *23 U.S.C. 148* and the statewide transportation planning process, proposed paragraph (d) states that the long-range statewide transportation plan should include a safety element that incorporates or summarizes the priorities, goals, countermeasures, or projects contained in the Strategic Highway Safety Plan (SHSP). See "Key Statutory Changes" above, on the SHSP requirement.

Proposed paragraph (i) requires that the long-range statewide transportation plan be developed, as appropriate, with State, Tribal, and local agencies responsible for land use management, natural resources, environmental protection, conservation, and historic preservation, including the comparison of transportation plans to State and Tribal inventories or plans/maps of natural and historic resources as mandated in *23 U.S.C. 135*(f)(2)(D) and *49 U.S.C. 5304*(f)(2)(D).

While the title of *23 U.S.C. 135*(f)(2)(D) and *49 U.S.C. 5304*(f)(2)(D) is "Consultation, Comparison and Consideration," it is important to note that the consultation referenced in the statute is different from the definition of consultation in the existing or proposed regulation. The statute specifically defines "consultation" in this section as involving "comparison of transportation plans to State and Tribal conservation plans or maps, if available, and comparison of transportation plans to inventories of natural or historic resources, if available."

Proposed paragraph (j) requires that the long-range statewide transportation plan contain a discussion of potential environmental mitigation activities (at the policy and/or strategic-levels, not project-specific). See "Key Statutory Changes" above. In developing this discussion in consultation with Federal, State, and Tribal land management, wildlife, and regulatory agencies, this proposed paragraph allows States to establish reasonable timeframes for performing this consultation.

Proposed paragraph (k) identifies the "interested parties" defined in *23 U.S.C. 135*(f)(3)(A) and *49 U.S.C. 5304*(f)(3)(A) that must be provided a reasonable opportunity to comment on the proposed long-range statewide transportation plan.

Proposed paragraph (l) would implement a provision, added by TEA-21 and retained in *23 U.S.C. 135*(f)(5) and *49 U.S.C. 5304*(f)(5), for an optional financial plan to be developed to support the long-range statewide transportation plan.

Another provision added by the TEA-21, retained by *23 U.S.C. 135*(f)(5) and *49 U.S.C. 5304*(f)(5), and reflected in proposed paragraphs (l) and (m) states that the financial plan may include informational "illustrative projects" reflecting additional projects that would be included if other revenue sources were to become available.

Also reflecting language in *23 U.S.C. 135*(f)(3)(B)(iii) and *49 U.S.C. 5304*(f)(3)(B)(iii), proposed paragraph (n) would require the State to publish or otherwise make available the long-range statewide transportation plan in electronically accessible formats and means (such as the World Wide Web). See "Key Statutory Changes" above. [*33518]

Section 450.216 Development and Content of the Statewide Transportation Improvement Program (STIP)

Existing § 450.216 would be re-titled. Except for some restructuring and reorganization, much of the content of existing § 450.216 would remain intact.

Substantive changes reflected in proposed § 450.216 reflect key legislative and statutory changes resulting from the TEA-21 and the SAFETEA-LU. Proposed paragraph (a) requires that the STIP cover a period of at least four years and be updated at least every four years. Proposed paragraph (e) would require, pursuant to *23 U.S.C. 204*(a) or (j), that Federal Lands Highway program TIPs be included without modification in the STIP (directly or by reference) once approved by the FHWA.

Proposed paragraph (l) would implement a provision, included in the TEA-21 and retained in *23 U.S.C. 135*(g)(4)(F) and *49 U.S.C. 5304*(g)(4)(F), that a financial plan may be developed to support the STIP. Proposed paragraph (l) would be consistent with the FHWA/FTA Interim Guidance on Fiscal Constraint that was issued on June 30, 2005, n13 and is included in Appendix B. Another provision in paragraph (l) that was prompted by TEA-21 and retained in *23 U.S.C. 135*(g)(4)(F) and *49 U.S.C. 5304*(g)(4)(F), states that the financial plan may include informational "illustrative projects" reflecting additional projects that would be included if other revenue sources were to become available.

n13 This joint guidance is available via the Internet at the following URL: *http://www.fhwa.dot.gov/planning/fcindex.htm.*

Proposed paragraph (m) also would retain the provision in existing § 450.216(a)(5) that projects included in the first two years of the STIP in nonattainment and maintenance areas shall be limited to those for which funds are available or committed. The FHWA and the FTA believe that retaining this provision is critical to realistic, meaningful planning and public involvement.

The FHWA and the FTA invite comments on whether the agencies should require States submitting STIP amendments to demonstrate that funds are "available or committed" for projects identified in the STIP in the year the STIP amendment is submitted and the following year.

Proposed paragraph (o) would allow projects in the first four of years of the STIP to be advanced in place of another project in the first four years of the STIP, subject to the project selection requirements of § 450.220. In addition, proposed paragraph (o) recognizes State discretion to revise the STIP under procedures agreed to by the State, the MPOs and the public transportation operators. The FHWA and the FTA recognize that changes to transportation programs between formal update cycles may be necessary. We have proposed definitions for the terms "administrative modification," "amendment," and "revision" to clarify these actions.

Section 450.218 Self-certification, Federal Findings, and Federal Approvals

Existing § 450.220 would be re-titled and redesignated as § 450.218. Proposed paragraph (a) would revise existing § 450.220(a) to reflect that the State must submit the entire STIP to the FHWA and the FTA for joint approval, at least once every four years, consistent with the extended cycle established in *23 U.S.C. 135*(g)(1) and *49 U.S.C. 5304*(g)(1). Furthermore, the State must submit any STIP amendments for joint approval. In addition, proposed paragraphs (a)(1) through (a)(8) would articulate the existing legislative and regulatory authorities to be included in the State self-certification, including three additional Federal requirements ((1) the Older Americans Act; (2) *23 U.S.C. 324* regarding the prohibition of discrimination based on gender; and (3) section 504 of the Rehabilitation Act of 1973 regarding discrimination against individuals with disabilities). These requirements previously existed and the regulations would be revised to include them.

We also are proposing to modify existing § 450.220(b) slightly in proposed paragraph (b) to indicate the relationship of the FHWA/FTA planning finding on the statewide transportation planning process to self-certifications by the State.

Existing § 450.220(d) would be revised and redesignated as a new proposed paragraph (c), indicating that STIP extensions (and by their inclusion, TIP extensions) would be limited to 180 days, with priority consideration to be given to projects and strategies involving the operation and management of the multimodal transportation system.

Section 450.220 Project Selection From the STIP

Existing § 450.222 would be re-titled and redesignated as § 450.220 and the references to funding categories updated. This section generally would remain unchanged, except for two key additions.

Proposed paragraph (d) reflects the requirement in *23 U.S.C. 204*(a)(5) that Federal Lands Highway program projects be included in an approved STIP.

Proposed paragraph (e) would provide the option for expedited project selection procedures to be used, as agreed to by all parties involved in the project selection process.

The FHWA and the FTA invite comments on whether States should be required to prepare an "agreed to" list of projects at the beginning of each of the four years in the STIP, rather than only the first year. The FHWA and the FTA also invite comments on whether a STIP amendment should be required to move a project between years in the STIP, if an "agreed to" list is required for each year.

Section 450.222 Applicability of NEPA to Statewide Transportation Plans and Programs

This new proposed section re-states the provisions of the TEA-21 and *23 U.S.C. 135*(j) and *49 U.S.C. 5304*(j) that any decisions by the Secretary regarding the long-range statewide transportation plan and the STIP are not Federal actions subject to the provisions of the NEPA.

Section 450.224 Phase-In of New Requirements

Existing § 450.224 would be revised. This proposed section re-states the provisions in *23 U.S.C. 135*(j)(B) and *49 U.S.C 5304*(p)(B) that State transportation improvement programs adopted on or after July 1, 2007 shall reflect the provisions of *23 U.S.C. 134* and 135 and U.S.C. 5303 and 5304 as amended by the SAFETEA-LU. In addition, this proposed section clarifies that all State and FHWA/FTA actions on transportation plans and programs taken on or after July 1, 2007 (*i.e.*, updates and amendments) are subject to the provisions of *23 U.S.C. 134* and 135 and U.S.C. 5303 and 5304 as amended by SAFETEA-LU and these proposed rules. Provisions for early accommodation of SAFETEA-LU requirements, as well as its revised update cycles also are described in this section.

Subpart C--Metropolitan Transportation Planning and Programming

Section 450.300 Purpose

Existing § 450.300 would be retained. The statement of purpose would be slightly revised to include a specific reference to "accessible pedestrian walkways and bicycle facilities," as specified in *23 U.S.C. 134*(c)(2) and *49 U.S.C. 5303*(c)(2). [*33519]

Section 450.302 Applicability

Existing § 450.302 would be retained with minor changes to reflect current statutory citations related to metropolitan transportation planning and programming.

Section 450.304 Definitions

This section would remain the same, except for the addition of *49 U.S.C. 5302* as a statutory citation.

Section 450.306 Scope of the Metropolitan Transportation Planning Process

For purposes of simplification, existing § 450.316(a) would be relocated to § 450.306(a), re-titled and revised by replacing the 16 planning factors from ISTEA with the eight planning factors in *23 U.S.C. 134*(h)(1) and *49 U.S.C. 5303*(h)(1). See "Key Statutory Changes" above. The planning factors are based on the language in the statute, with the exception of minor amplification of the factor on "security."

Proposed paragraph (b) provides general information on the use of and application of the eight planning factors throughout the metropolitan transportation planning process.

Proposed paragraph (c) is consistent with language in *23 U.S.C. 134*(h)(2) and *49 U.S.C. 5303*(h)(2) that the failure to consider any of the factors shall not be reviewable by any court in any matter affecting a metropolitan transportation plan, TIP, or the FHWA/FTA certification of a metropolitan transportation planning process.

Proposed paragraph (d) would require metropolitan transportation planning processes to be coordinated with the statewide transportation planning process as specified in *23 U.S.C. 135*(b) and U.S.C. 5304(b).

Paragraph (e) is proposed to encourage MPOs to apply asset management principles and techniques in establishing planning goals, defining TIP priorities, and assessing transportation investment decisions to include system operations, preservation, and maintenance, as well as strategies and policies to support homeland security and to safeguard the personal security of all motorized and non-motorized users. Paragraph (f) is proposed to ensure that metropolitan transportation planning processes are carried out in a consistent manner with regional ITS architectures in 23 CFR part 940 (based on the ITS consistency requirement under section 5206(e) of the TEA-21).

Paragraph (g) is proposed to address the need for transportation planning processes to be consistent with the development of Coordinated Public Transit-Human Services Transportation Plans, as required by *49 U.S.C. 5310,* 5316, and 5317 as amended by the SAFETEA-LU.

Paragraph (h) is proposed to promote consistency with the metropolitan transportation planning process and the Strategic Highway Safety Plan, as specified in *23 U.S.C. 148,* and with the Regional Transit Security Strategy, as required by the Department of Homeland Security.

Paragraph (i) would re-locate and slightly revise the information contained in existing § 450.312(f) regarding the designation of urbanized areas over 200,000 population as transportation management areas (TMAs), as specified in *23 U.S.C. 134*(k)(1) and *49 U.S.C. 5303*(k)(1).

Paragraph (j) would re-locate and slightly revise the information contained in existing § 450.316(c) regarding the opportunity for MPOs serving non-TMAs in attainment of the NAAQS to propose (in cooperation with the State(s) and the public transportation operator(s)) a procedure for developing an abbreviated metropolitan transportation plan and TIP, for approval by the FHWA and the FTA.

Section 450.308 Funding for Transportation Planning and Unified Planning Work Programs

Existing § 450.314 would be slightly revised, re-titled, and redesignated as § 450.308. Proposed paragraph (a) discusses the categories of Federal funds that may be used for metropolitan transportation planning.

Proposed paragraph (b) would remove the reference to TMAs contained in existing § 450.314, with the intent of stressing that all MPOs have a responsibility to meet the requirements of this section. However, proposed paragraph (d) would continue the provision in *23 U.S.C. 134*(l) and *49 U.S.C. 5303*(l) that all MPOs serving non-TMAs may develop a simplified statement of work in lieu of a UPWP.

Section 450.310 Metropolitan Planning Organization Designation and Redesignation

Existing § 450.306 would be revised, re-titled, and redesignated as § 450.310. While much of the content of existing § 450.306 would not be significantly changed, a number of new paragraphs are proposed to address issues that have arisen since the enactment of the ISTEA in 1991, including the impacts of the 2000 decennial census.

Proposed paragraph (c) would provide that specific State legislation, State enabling legislation, or interstate compact should be utilized, to the extent possible, for designating MPOs.

Proposed paragraph (d) would mirror the language in *23 U.S.C. 134*(d)(2) and *49 U.S.C. 5303*(d)(2) outlining the composition of MPOs that serve TMAs.

Proposed paragraph (e) would provide clarifying information regarding multiple MPOs serving a single urbanized area, primarily based on language in *23 U.S.C. 134*(d)(6) and *49 U.S.C. 5303*(d)(6). Additional language is proposed regarding the development of written agreements between two or more MPOs serving the same urbanized area to clearly identify areas of coordination and the division of responsibilities among the MPOs.

Proposed paragraph (g) would retain existing § 450.306(e) regarding the opportunity for MPOs to utilize the staff of other agencies to carry out selected elements of the metropolitan transportation planning process.

New proposed paragraph (h) clarifies that a designated MPO remains in effect until it has been officially redesignated.

Proposed paragraph (k) would provide clarifying information on what constitutes "units of general purpose local government."

Proposed paragraphs (l) and (m) would provide clarifying information on situations that may or may not necessitate MPO redesignations. Since promulgation of the existing rule in 1993, the FHWA and the FTA have addressed a number of issues on this topic. On March 30, 2005, FHWA and FTA issued joint guidance entitled "FHWA/FTA Guidance on Designation and Redesignation of MPOs" n14 to address inconsistencies that existed between *23 U.S.C. 134, 49 U.S.C. 5303,* and 23 CFR part 450 on the designation and redesignation of MPOs. This joint guidance also provided clarifying information and illustrative examples of scenarios that may or may not trigger MPO redesignations, based on several actual events that transpired since the enactment of the TEA-21. The proposed text is based on this previously-issued guidance.

n14 This joint guidance is available via the Internet at the following URL: *http://www.fhwa.dot.gov/planning/mpodes.htm.*

Section 450.312 Metropolitan Planning Area Boundaries

Existing § 450.308 would be re-titled, redesignated as § 450.312 and revised to reflect the TEA-21 and the SAFETEA-LU changes to *23 U.S.C. 134* and *49 U.S.C. 5303.*

Proposed paragraph (a) would retain the option in existing § 450.308(a) of [*33520] extending the metropolitan planning area (MPA) boundary to the limits of the metropolitan statistical area or combined statistical area, as provided in *23 U.S.C. 134*(e)(2)(B) and *49 U.S.C. 5303*(e)(2)(B).

Proposed paragraph (b) would replace existing § 450.308(a) and includes the option to expand the MPA boundary to encompass the entire area designated as nonattainment for the ozone, carbon monoxide, or particulate matter NAAQS.

Proposed paragraph (c) allows a MPA boundary to encompass more than one urbanized area.

Proposed paragraph (d) states that a MPA boundary may be established to coincide with the geography of regional economic development and growth forecasting areas. This provision is intended to provide impetus for strengthening linkages between metropolitan transportation planning and economic development planning, as articulated in *23 U.S.C. 134*(g)(3) and *49 U.S.C. 5303*(g)(3).

Proposed paragraph (e) allows new census designated urbanized areas within an existing MPA without requiring redesignation of the existing MPO.

Proposed paragraph (f) addresses situations where the boundaries of an urbanized area or MPA extend across two or more States to encourage coordinated transportation planning in multistate areas.

Proposed paragraph (g) explicitly states that a MPA boundary shall not overlap with another MPA.

Proposed paragraph (h) establishes options for addressing situations in which part of an urbanized area extends into an adjacent MPA. The affected MPOs may either adjust their respective MPA boundaries so that the urbanized area lies only within one MPA or establish written agreements that clearly identify areas of coordination and division of transportation planning responsibilities between the MPOs.

Proposed paragraph (j) provides clarifying information to existing § 450.308(d) on the need for approved MPA boundaries to be provided to the FHWA and the FTA in sufficient detail to be accurately delineated on a map. The FHWA and the FTA would collect this data for informational purposes only to understand national policy issues such as

the dynamics related to multiple planning geographies (e.g., MPA boundaries compared to air quality nonattainment and maintenance areas).

Section 450.314 Metropolitan Planning Agreements

Existing § 450.310 and § 450.312 would be combined, revised, re-titled, and redesignated as § 450.314.

The content of existing § 450.310(a), (b) and (d) would be combined and largely retained in proposed paragraph (a), except that the reference to "corridor and subarea studies" in existing § 450.310(a) would be removed. "Corridor and subarea studies" are proposed to be addressed in § 450.318.

Proposed paragraph (a) requires a written agreement(s) by the MPO, State(s), and public transportation operator(s) that clearly identifies their mutual responsibilities in carrying out the metropolitan transportation planning process.

Proposed paragraph (a)(1) would require such an agreement(s) to include specific provisions for the cooperative development and sharing of information related to the financial plans that support the metropolitan transportation plan, the TIP and the annual listing of obligated projects. This proposed paragraph is intended to articulate the cooperative relationships reflected in the TEA-21 and the SAFETEA-LU.

Proposed paragraph (a)(2) would encourage the written agreement(s) to include provisions for consulting with officials responsible for other types of planning affected by transportation (e.g., State and local planned growth, economic development, environmental protection, airport operations, freight movements, non-emergency transportation service providers funded by other sources than title 49, U.S.C., Chapter 53, and safety/security operations). This proposed paragraph is intended to articulate the extensive cooperative relationships reflected in the *23 U.S.C. 134* and *49 U.S.C. 5303*.

Proposed paragraph (b) regarding interagency cooperation in MPAs that do not include the entire air quality nonattainment or maintenance areas would retain existing 450.310(f), except for minor wording changes for clarification.

Proposed paragraph (c) would retain existing § 450.310(c), except for minor wording changes for clarification.

Existing § 450.310(d) would be removed since more than one agreement may be necessary to cover the realm of the various cooperative working relationships necessary to undertake comprehensive metropolitan transportation planning.

Existing § 450.310(e) would be removed, since new proposed § 450.308 contains additional information on cooperative working relationships to be documented in the UPWP or simplified statement of work.

Proposed paragraph (d) combines several paragraphs from existing § 450.310 and § 450.312 regarding cooperative agreements among planning agencies when more than one MPO serves a single urbanized area. Proposed paragraph (d) requires coordination of metropolitan transportation plans and TIPs, and strongly encourages coordinated data collection, analysis, and planning assumptions across and between the MPOs, including coordination when transportation improvements extend across the boundaries of more than one MPA. This proposed paragraph also allows multiple MPOs to jointly develop a single, coordinated metropolitan transportation plan and TIP for the entire urbanized area.

Proposed paragraph (e) includes provisions in *23 U.S.C. 134*(f) and *49 U.S.C. 5303*(f) for situations in which the boundaries of the urbanized area or MPA extend across two or more States.

Proposed paragraph (f) would specifically allow for part of an urbanized area designated as a TMA to overlap into an adjacent MPA serving a non-TMA urbanized area without requiring the entire adjacent urbanized area also to be designated as a TMA. While MPA boundaries may not overlap, more than one MPO may serve a single MPA. Proposed paragraph (f) would require TMAs to establish formal agreements that clearly define specific MPO responsibilities within the urbanized area. This proposed change acknowledges the geographical boundary complexities that arose with the 2000 census. n15 If the affected MPOs choose to pursue this option, proposed paragraph (f) would require the development of a written agreement between the MPOs, the State(s), and the public transportation operator(s) describing how specific TMA requirements (*e.g.*, congestion management process, surface transportation program funds suballocated to the urbanized area over 200,000 population, and project selection) will be met for the overlapping part of the urbanized area.

n15 For the 2000 decennial Census, the Bureau of the Census used a new procedure for defining urbanized areas, based strictly on the population density of census blocks and block groups. This resulted in most urbanized areas having very irregular shaped boundaries, with a large number of these urbanized areas extending across traditional jurisdic-

tional boundaries (*e.g.*, counties and townships), which are often used to define the metropolitan planning area boundaries.

Existing § 450.312(i) has been retained, expanded, and relocated to proposed § 450.316(c) discussed below. [*33521]

Section 450.316 Interested Parties, Participation, and Consultation

Existing § 450.316(b) would be revised, expanded, re-titled, and redesignated as § 450.316. Since the enactment of the ISTEA in 1991, MPOs have been required to develop and utilize a proactive public involvement process that provides complete information, timely public notice, full public access to key decisions, and supports early and continuing involvement of the public in developing metropolitan transportation plans and TIPs. Title *23 U.S.C. 134*(i)(5) and *49 U.S.C. 5303*(i)(5) as amended by the SAFETEA-LU expanded the public involvement provisions by requiring MPOs to develop and utilize "participation plans" that are developed in consultation with an expanded list of "interested parties" identified in *23 U.S.C. 134*(i)(5)(A) and *49 U.S.C. 5303*(i)(5)(A). See "Key Statutory Changes" above.

Proposed paragraph (a) would describe the requirement in *23 U.S.C. 134*(i)(5)(B) and *49 U.S.C. 5303*(i)(5)(B) as amended by the SAFETEA-LU for developing and using a documented Participation Plan and would retain much of the content from existing § 450.316(b), with additional language provided to directly address the requirement in *23 U.S.C. 134*(i)(5)(A) and *49 U.S.C. 5303* for extensive stakeholder "participation" that is above and beyond "public involvement." Specifically, proposed paragraph (a) would re-state the requirements in *23 U.S.C. 134*(i)(5)(C) and *49 U.S.C. 5303*(i)(5)(C) for the MPO to hold any public meetings at convenient and accessible locations and times, employ visualization techniques to describe metropolitan transportation plans and TIPs, and make public information available in electronically accessible format and means (such as the World Wide Web).

The FHWA and the FTA recognize that there are myriad ways to use visualization techniques to better convey plans and programs and there are wide variations among MPO capabilities and needs, especially between large, established MPOs and small, new MPOs. States and MPOs may use everything from static maps to interactive GIS systems, from artist renderings and physical models to photo manipulation to computer simulation. Visualization can be used to support plans, individual projects or Scenario Planning, where various future scenarios are depicted to allow stakeholders to develop a shared vision for the future by analyzing various forces (*e.g.*, health, transportation, economic, environment, land use, etc.) that affect growth.

While the FHWA and the FTA will encourage States and MPOs to identify and implement the most appropriate visualization technique for their particular circumstances, we do not propose to specify when specific techniques must be used. As technology continues to change and visualization techniques evolve, we anticipate that the techniques will be varied as they appropriately illustrate the project or plans they are trying to explain.

The FHWA and the FTA will provide technical assistance and information to States and MPOs on how to deploy different visualization techniques and will share noteworthy practices to highlight innovations that provide the public, elected and appointed officials and other stakeholders with better opportunities to understand the various options proposed for plans and programs. The FHWA and the FTA will share this information through the Transportation Planning Capacity Building Program, Web sites and publications.

Title *23 U.S.C. 134*(i)(5)(B) and *49 U.S.C. 5303*(i)(5)(B), as amended by SAFETEA-LU, require development of a participation plan. The FHWA and the FTA propose that the participation plan include elements of the public involvement process currently required of MPOs, as well as new requirements mandated by SAFETEA-LU. Proposed paragraph (a) identifies the interested parties to be included in the metropolitan transportation planning process, largely retains the language in existing § 450.316(b) regarding the public involvement process and builds on that process to describe the requirements of the new participation plan.

Proposed paragraph (a)(1)(vi) largely retains the language in existing § 450.316(b)(1)(v) that would require the participation plan to demonstrate explicit consideration and response to public input received during the development of the metropolitan transportation plan and the TIP.

Proposed paragraph (a)(1)(vii) largely retains the language in existing § 450.316(b)(1)(vi) that would require the participation plan to seek out and consider the needs of those traditionally underserved by existing transportation systems, including low-income and minority households.

Proposed paragraph (a)(1)(viii) largely retains the language in existing § 405.316(b)(1)(viii) that would require the participation plan to provide an additional opportunity for public comment, if the final metropolitan transportation plan or TIP differs significantly from the version that was initially made available for public comment.

Proposed paragraph (a)(1)(ix) largely retains the language in existing § 450.316 (b)(1)(xi) that the participation plan be coordinated with the statewide transportation planning public involvement and consultation processes.

Proposed paragraph (a)(1)(x) largely retains the language in existing § 450.316(b)(1)(ix) requiring MPOs to periodically review the participation plan's effectiveness to ensure a full and open participation process.

Proposed paragraph (a)(2) largely retains the language in existing § 450.316(b)(1)(vii) regarding the MPO's disposition of comments received on the draft metropolitan transportation plan or TIP as part of the final metropolitan transportation plan or TIP.

Proposed paragraph (a)(3) would retain the language in existing § 450.316(b)(1)(i) requiring a minimum public comment period of 45 calendar days be provided before the initial or revised participation plan is adopted by the MPO.

Proposed paragraph (b) reiterates the language in *23 U.S.C. 134*(i)(4) and *49 U.S.C. 5303*(i)(4) that requires MPOs to consult with agencies and officials responsible for other planning activities within the MPA that are affected by transportation in the development of metropolitan transportation plans and TIPs. See "Key Statutory Changes" above.

Proposed paragraphs (c) and (d) expand upon existing § 450.312(i) regarding MPO consultation with Indian Tribal governments or Federal land management agencies in the development of metropolitan plans and TIPs when the MPA includes Indian Tribal lands or Federal public lands. See "Key Statutory Changes" above.

Proposed paragraph (e) encourages MPOs to develop a documented process(es) that outlines roles, responsibilities, and key decision points for consulting with other governments and agencies, as defined in proposed paragraphs (b), (c) and (d). Such procedures may be included in the agreement(s) developed under proposed § 450.314. This proposed paragraph is intended to communicate the importance for MPOs to consult with a diverse array of State, local, and Indian Tribal governments and agencies in carrying out comprehensive metropolitan transportation planning. [*33522]

Section 450.318 Transportation Planning Studies and Project Development

Existing § 450.318 would be revised and re-titled. Section 1308 of the TEA-21 eliminated the major investment study (MIS) as a separate requirement and required the Secretary to integrate, as appropriate, the remaining aspects and features of the MIS (and associated corridor or subarea studies) into the transportation planning and NEPA regulations (23 CFR part 771).

Since 1998, the FHWA and the FTA (in cooperation with Federal, environmental, resource, and regulatory agencies) have undertaken several initiatives to promote strengthened linkages between the transportation planning and project development/NEPA processes under existing legislative, statutory, and regulatory authorities. In particular, on February 22, 2005, the FHWA and the FTA disseminated legal analysis and program guidance entitled "Linking the Transportation Planning and NEPA Processes". n16 Although voluntary to States, MPOs, and public transportation operators, this program guidance was intended to articulate how information, analysis, and products from metropolitan and statewide transportation planning processes could be incorporated into and relied upon in the NEPA process under existing Federal statutes and regulations. Proposed § 450.318 is structured around the guiding principles and legal opinion reflected in that document.

n16 This guidance document is available via the Internet at the following URL: *http:// nepa.fhwa.dot.gov/ ReNepa/ReNepa.nsf/ aa5aec9f63be385c85256 8cc0055ea16/ 9fd918150ac244 9685256fb10050726c?OpenDocument.*

Section 450.320 Congestion Management Process in Transportation Management Areas

Existing § 450.320 would be retained as § 450.320, and revised and re-titled to reflect the requirement in *23 U.S.C. 134*(k)(3) and *49 U.S.C. 5303*(k)(3) that TMAs develop and use a congestion management process. See "Key Statutory Changes" above.

The SAFETEA-LU amended *23 U.S.C. 134*(k)(3) and *49 U.S.C. 5303*(k)(3) to require that the planning process in a TMA include a congestion management "process" instead of a "system". This section is based on most of the information on "congestion management systems" contained in 23 CFR part 500. Therefore, this proposed rulemaking transfers the TMA congestion management "system" requirements in *23 CFR 500.109* to this subpart. The intent is to reiterate

the importance of the congestion management process to TMA transportation planning and programming and consolidate this TMA requirement with the rest of the requirements for TMA planning processes.

In the past the CMS requirement, perhaps because it was a separate regulation, has often been carried out in a stove-piped manner, separate from the typical MPO planning process and separate from transportation system operational and management strategies. The proposed regulations reflect the goal that CMP be an integral part of developing a long range transportation plan and TIP for TMA MPOs. The proposed regulation also reflects the FHWA and the FTA goal to have a common set of performance measures and a common set of goals and objectives among the CMP, the long range transportation plan and the transportation systems operational and management strategies for a region. Items such as the regional ITS architecture and the selection process for projects to be included in the TIP should be consistent and seamless with the CMP. As part of developing the CMP, planners should be working in collaboration with others in the region, including public transportation operators and State and local operations staff.

Proposed paragraph (a) re-states the language in *23 U.S.C. 134*(k)(3) and *49 U.S.C. 5303*(k)(3) requiring the development and implementation of a congestion management process in TMAs.

Proposed paragraph (b) largely retains the definition of a CMS contained in existing *23 CFR 500.109(a)*

Proposed paragraphs (c)(1) through (c)(6) retain the specific TMA congestion management language from existing *23 CFR 500.109(b)(1)* through (b)(6).

Proposed paragraph (d) reflects the language in *23 U.S.C. 134*(m)(1) and *49 U.S.C. 5303*(m)(1) regarding the use of the congestion management process in TMAs designated as nonattainment for ozone or carbon monoxide. Paragraph (d) would require that any project that would result in a significant increase in the carrying capacity for single occupant vehicles (SOVs) be addressed through a congestion management process.

Proposed paragraph (e) largely retains the language in the latter portion of *23 CFR 500.109(c)* requiring analysis of all reasonable (including multimodal) travel demand reduction and operational management strategies for the corridor in which a project that would result in a significant increase in SOV capacity is proposed in nonattainment and maintenance area TMAs.

Proposed paragraph (f) reflects the language in *23 U.S.C. 135*(i) and *49 U.S.C. 5304*(i) allowing State laws, rules, or regulations pertaining to congestion management systems or processes to constitute the congestion management process.

The phase-in period defined in *23 CFR 500.109(d)(2)* would be removed from this proposed section since that date has passed.

Section 450.322 Development and Content of the Metropolitan Transportation Plan

Existing § 450.316 would be revised, re-titled, and redesignated as § 450.322, largely to reflect statutory requirements from the TEA-21 and the SAFETEA-LU.

Proposed paragraph (a) retains the language under existing § 450.316 that the metropolitan transportation plan must address at least a 20-year planning horizon. Additional clarifying information would specify that the minimum 20-year horizon applies at the time the metropolitan transportation plan is approved by the MPO. Proposed paragraph (a) would clarify that the effective date of the metropolitan transportation plan in nonattainment and maintenance areas is the date of a conformity determination issued by the FHWA and the FTA. This proposed change is intended to eliminate confusion over the validity of the metropolitan transportation plan in relation to the timing of the MPO and the FHWA/FTA conformity determinations, as well as provide a consistent temporal basis to track the new four-year update cycle established by the SAFETEA-LU.

Proposed paragraph (c) reflects the provision in *23 U.S.C. 134*(i)(1) and *49 U.S.C. 5303*(i)(1) that metropolitan transportation plans in air quality nonattainment and maintenance areas be updated at least every four years, instead of the former three-year update cycle. For attainment area MPOs, proposed paragraph (c) would maintain the previous 5-year update cycle. See "Key Statutory Changes" above. In addition, proposed paragraph (c) would provide MPO discretion to revise the plan as necessary. The FHWA and the FTA recognize that changes to transportation plans between formal update cycles may be necessary. We have proposed definitions for the terms "administrative modification," [*33523] "amendment," and "revision" to clarify these actions.

Proposed paragraph (d) addresses the State air quality agency coordination of the development of the TCMs in a SIP. This proposed paragraph also discusses the "TCM substitution" provisions in Section 6011(d) of the SAFETEA-LU.

Proposed paragraph (f)(2) notes that the locally preferred alternative selected from a planning Alternatives Analysis under the FTA's Capital Investment Grant program *(49 U.S.C. 5309* and 49 CFR part 611) need to be adopted by the MPO as part of the metropolitan transportation plan as a condition for funding under *49 U.S.C. 5309.*

As specified in *23 U.S.C. 134*(i)(2)(D) and *49 U.S.C. 5303*(i)(2)(D), proposed paragraph (f)(3) would require the metropolitan transportation plan include operational and management strategies to improve the performance of existing transportation facilities to relieve vehicular congestion and maximize the safety and mobility of people and goods. See "Key Statutory Changes" above.

The FHWA and the FTA believe improved planning for the operations and management of the Nation's transportation system is vitally important to achieving the high expectations for safety, reliability, and mobility for people and freight in the 21st century. Operations and management (or management and operations) is a coordinated approach to optimizing the performance of existing infrastructure through implementation of multimodal, intermodal, and often cross-jurisdictional systems, services, and projects. To be effective, management and operations must be viewed as a collaborative effort between transportation planners and managers with responsibility for day-to-day transportation operations. Management and operations refers to a broad range of strategies. Examples include traffic detection and surveillance, work zone management, emergency management, freight management systems, and traveler information services. Such strategies enhance reliability and service efficiency; improve public safety and security; reduce traveler delays associated with incidents and other events; and improve information for businesses and for the traveling public.

Proposed paragraph (f)(7) would require, consistent with *23 U.S.C. 134*(i)(2)(B) and *49 U.S.C. 5303*(i)(2)(B), that the metropolitan transportation plan contain a discussion of potential environmental mitigation activities (at the policy- and/or strategic-levels, not project-specific), developed in consultation with Federal, State, and Tribal regulatory agencies responsible for land management, wildlife, and other environmental issues. In addition, this proposed paragraph allows MPOs to establish reasonable timeframes for performing this consultation. See "Key Statutory Changes" above.

Proposed paragraph (f)(10) would implement the provision, in *23 U.S.C. 134*(i)(2)(C) and *49 U.S.C. 5303*(i)(2)(C), for a financial plan to be developed to support the metropolitan transportation plan. In addition, proposed paragraph (f)(9), states that the financial plan may include informational "illustrative projects" reflecting additional projects that would be included if other revenue sources were to become available as allowed by *23 U.S.C. 134*(i)(2)(C) and *49 U.S.C. 5303*(i)(2)(C). Appendix B to this proposed rule contains a revised version of the FHWA/FTA Guidance on Fiscal Constraint of Transportation Plans and Programs, which is based on interim guidance issued by the FHWA and the FTA. n17

n17 FHWA/FTA Guidance on Fiscal Constraint of Transportation Plans and Programs, June 30, 2005, available via the Internet at the following URL: *http://www.fhwa.dot.gov/planning/fcindex.htm.*

Proposed paragraph (g) would require that the metropolitan transportation plan be developed, as appropriate, in consultation with State and local agencies responsible for land use management, natural resources, environmental protection, conservation, and historic preservation, including the comparison of transportation plans to State and Indian Tribal inventories or plans/maps of natural and historic resources, as specified in *23 U.S.C. 134*(i)(2)(B)(ii) and *49 U.S.C. 5303*(i)(2)(B)(ii). See "Key Statutory Changes" above.

While the title of *23 U.S.C. 134*(i)(4) and *49 U.S.C. 5303*(i)(4) is "Consultation", it is important to note that the consultation referenced in proposed paragraph (g) is different from the definition of consultation in the existing or proposed regulation. The statute specifically defines "consultation" in this section as involving, as appropriate, "comparison of transportation plans with State conservation plans or maps, if available, or comparison of transportation plans to inventories of natural or historic resources, if available."

In order to draw a strong link between the Strategic Highway Safety Planning process described in *23 U.S.C. 148* and the metropolitan transportation planning process, proposed paragraph (h) states that the metropolitan transportation plan should include a safety element that incorporates or summarizes the priorities, goals, countermeasures, or projects for the MPA contained in the Strategic Highway Safety Plan. This proposed paragraph also seeks to promote consistency between the development of metropolitan transportation plans and emergency relief/disaster preparedness plans, as well as strategies and policies that support homeland security and safeguard the personal security of all motorized and non-motorized users (as appropriate).

Proposed paragraph (i) would provide opportunities to comment for the "interested parties", specified in *23 U.S.C. 134*(i)(5) and *49 U.S.C. 5303*(i)(5) in the development of the metropolitan transportation plan, using the participation plan developed under proposed § 450.316.

Proposed paragraph (j) would require the MPO to publish or otherwise make available the metropolitan transportation plan in electronically accessible formats and means (such as the World Wide Web), to the maximum extent practicable as specified in *23 U.S.C. 134*(i)(5)(C) and *49 U.S.C. 5303*(i)(5)(C). See "Key Statutory Changes" above.

The FHWA and the FTA recognize that there are myriad ways to use visualization techniques to better convey plans and programs. States and MPOs may use everything from static maps to interactive GIS systems, from artist renderings and physical models to photo manipulation to computer simulation. Visualization can be used to support plans, individual projects or Scenario Planning, where various future scenarios are depicted to allow stakeholders to develop a shared vision for the future by analyzing various forces (*e.g.*, health, transportation, economic, environmental, land use, etc.) that affect growth. While the FHWA and the FTA will encourage States and MPOs to identify and implement the most appropriate visualization technique for their particular circumstances, we do not propose to specify when specific techniques must be used. There is too much variation among MPOs and their circumstances to mandate specific visualization techniques. As technology continues to change and visualization techniques evolve, we anticipate that the techniques will be varied as they appropriately illustrate the projects and plans MPOs are trying to explain.

The FHWA and the FTA will provide technical assistance and information to States and MPOs on how to deploy different visualization techniques and will share noteworthy practices to highlight innovations that provide the [*33524] public, elected and appointed officials and other stakeholders with better opportunities to understand the various options proposed for plans and programs. This information will be shared through the Transportation Planning Capacity Building Program, our Web sites and publications.

Proposed paragraph (l) would be added to authorize utilization of an interim transportation plan during a conformity lapse, with the intent to continue funding of exempt projects, transportation control measures (TCMs) in an approved State Implementation Plan, and other projects that can advance under a conformity lapse in accordance with 40 CFR part 93. Under the provisions of § 176(c) of the Clean Air Act, as amended by the SAFETEA-LU, nonattainment and maintenance areas have 12 months from the time the area misses a deadline to determine conformity of their transportation plan or TIP before a conformity lapse occurs. During this conformity lapse grace period, all planning requirements in this subpart and subpart B must still be met.

Section 450.324 Development and Content of the Transportation Improvement Program (TIP)

Existing § 450.324 would be revised and retained as § 450.324. Except for some restructuring and reorganization, much of the content of existing § 450.324 would remain intact.

Substantive changes reflected in proposed § 450.324 are consistent with key legislative and statutory changes resulting from the TEA-21 and the SAFETEA-LU. Proposed paragraph (a) requires that the TIP cover a period of at least four years and be updated at least every four years. See "Key Statutory Changes" above.

Proposed paragraph (d) would modify existing § 450.324(f)(4) and (f)(5) to clarify that all regionally significant projects, whether federally funded or otherwise, would be included in the metropolitan TIP for purposes of transportation conformity, fiscal constraint, and public disclosure.

Proposed paragraph (h) would implement a provision, retained in *23 U.S.C. 134*(j)(2)(B) and *49 U.S.C. 5303*(j)(2)(B), requiring a financial plan to be developed to support the TIP. Another provision added by TEA-21, retained in *23 U.S.C. 134*(j)(2)(B) and *49 U.S.C. 5303*(j)(2)(B), and also reflected in proposed paragraph (h), states that the financial plan may include informational "illustrative projects" reflecting additional projects that would be included if other revenue sources were to become available.

Proposed paragraph (i) would retain provisions in existing § 450.324(e) that explains the fiscal constraint standard for TIPs. The FHWA and the FTA believe that retaining these provisions are extremely important to meaningful planning and public involvement to ensure that TIPs are not merely "wish lists."

The FHWA and the FTA invite comments on whether the agencies should require MPOs submitting TIP amendments to demonstrate that funds are "available or committed" for projects identified in the TIP in the year the TIP amendment is submitted and the following year.

Proposed paragraph (k) would be added to authorize utilization of an interim TIP during a conformity lapse, with the intent to continue funding exempt projects, transportation control measures (TCMs) in an approved State Implementation Plan, and other projects that can advance under a conformity lapse in accordance with 40 CFR part 93. Under the provisions of § 176(c) of the Clean Air Act, as amended by the SAFETEA-LU, nonattainment and maintenance areas have 12 months from the time the area misses a deadline to determine conformity of their transportation plan or TIP before a conformity lapse occurs. During this conformity lapse grace period, all planning requirements in this subpart and subpart B must still be met.

Section 450.326 TIP Revisions and Relationship to the STIP

Existing § 450.326 and § 450.328 would be combined, re-titled, and redesignated as § 450.326. The existing regulatory text would remain largely unchanged. It allows for revision of TIPs through the addition or deletion of projects, subject to conditions that protect the principles of fiscal constraint and public involvement. The FHWA and the FTA recognize that changes to TIPs between formal update cycles may be necessary. This proposed section intends to clarify that in nonattainment and maintenance areas, a new conformity determination is necessary unless the changes to TIPs are administrative modifications (*i.e.*, addition or deletion of exempt projects). Consistent with this, proposed paragraph (a) would clarify that a new conformity determination is necessary when regionally significant non-exempt projects are added to or deleted from a TIP. Similarly, moving a project or a phase of a project from year five or later of a TIP to the first four years would constitute an amendment that would require a new conformity determination. And, in all areas, changes that affect fiscal constraint must take place by amendment of the TIP. We have proposed definitions for the terms "administrative modification," "amendment," and "revision" to clarify these actions.

Section 450.328 TIP Action by the FHWA and the FTA

Existing § 450.330 would be redesignated as § 450.328. The existing regulatory text would be changed slightly for clarification or technical corrections.

A new paragraph (c) would address situations in which a metropolitan transportation plan is not updated within the cycles required in the SAFETEA-LU, and proposes limitations on projects that could be advanced from an existing TIP. In nonattainment and maintenance areas, § 176(c) of the Clean Air Act, as amended by the SAFETEA-LU, provides a 12-month conformity lapse grace period from the time conformity expires on a plan or TIP before an area enters a conformity lapse. During the conformity lapse grace period, all planning requirements defined in 450.322 and 450.324 must still be met. As long as the TIP is still valid, projects can continue to be advanced, but amendments to the TIP would require a new conformity determination.

A new paragraph (e) would be added to address the addition of "illustrative projects" to TIPs. This proposed paragraph makes it clear that no Federal action may be taken on these projects until they become formally included in the TIP, as specified in statute.

Section 450.330 Project Selection From the TIP

Existing § 450.332 would be revised, re-titled, and redesignated as § 450.330. Existing § 450.332(a), (b), and (c) would be redesignated as § 450.330(b), (c) and (a), respectively, with largely citation corrections made to the text. In addition, proposed paragraph (a) has been revised to reflect the requirement in *23 U.S.C. 134*(j)(2)(A) and *49 U.S.C. 5303*(j)(2)(A) that the TIP include projects covering four years. See "Key Statutory Changes" above.

With minor citation changes, existing § 450.332(d) and (e) would be redesignated in proposed § 450.330 paragraphs (d) and (e), respectively.

The FHWA and the FTA invite comments on whether MPOs should be required to prepare an "agreed to" list of projects at the beginning of each of the four years in the TIP, rather than only the first year. The FHWA and the FTA also invite comments on whether a TIP amendment should be required to [*33525] move a project between years in the TIP, if an "agreed to" list is required for each year.

Section 450.332 Annual Listing of Obligated Projects

This new proposed section addresses the requirements of the TEA-21 and *23 U.S.C. 134*(j)(7)(B) and *49 U.S.C. 5303*(j)(7)(B) for the development of an annual listing of projects (including investments in pedestrian walkways and

bicycle facilities) for which funds under *23 U.S.C. or 49* U.S.C. Chapter 53 were obligated in the preceding program year in MPAs.

Proposed paragraph (a) re-states the language in *23 U.S.C. 134*(j)(7)(B) and *49 U.S.C. 5303*(j)(7)(B) that the annual listing shall be cooperatively developed by the State(s), public transportation operator(s), and the MPO, in accordance with § 450.314(a) and specifies the timetable for publication of the annual listing.

Proposed paragraph (b) specifies that the information contained in the annual listing of obligated projects be consistent with the information contained in the TIP and specifies the information to be included.

Proposed paragraph (c) states that the annual listing of obligated projects shall be published or otherwise made available by the MPO in accordance with the participation plan's criteria related to the TIP.

Section 450.334 Self-Certifications and Federal Certifications

Existing § 450.334 would be revised, re-titled, and retained as § 450.334. Proposed paragraph (a) would revise existing § 450.334(a) to align the transmittals of the State/MPO self-certifications and the TIP to the FHWA and the FTA, thereby reflecting the language in *23 U.S.C. 134*(j)(1)(D) and *49 U.S.C. 5303*(j)(1)(D) that requires TIPs to be updated at least once every four years. In addition, proposed paragraphs (a)(1) through (a)(8) would articulate the existing legislative and regulatory authorities to be included in the State/MPO self-certification, including three additional Federal requirements (1) the Older Americans Act, (2) *23 U.S.C. 324* regarding the prohibition of discrimination based on gender, and (3) section 504 of the Rehabilitation Act of 1973 regarding discrimination against individuals with disabilities). These requirements previously existed and the regulations would be revised to include them.

Proposed paragraph (b) would combine and revise the content of existing § 450.334(b) through (h), based largely on language in *23 U.S.C. 134*(k)(5) and *49 U.S.C. 5303*(k)(5) that describes TMA certification. In addition, proposed paragraphs (b)(1)(i) through (b)(1)(iii) describe specific FHWA/FTA options on TMA certification.

Section 450.336 Applicability of NEPA to Metropolitan Transportation Plans and Programs

This new proposed section includes the provisions of the TEA-21 and *23 U.S.C. 134*(p) and *49 U.S.C. 5303*(p) that any decisions by the FHWA and the FTA regarding the metropolitan transportation plan and the TIP are not Federal actions subject to the provisions of NEPA.

Section 450.338 Phase-in of New Requirements

Existing § 450.336 would be revised and redesignated as § 450.338. Proposed paragraphs (a), (b) and (c) include the requirements in Sections 3005(b) and 6001(b) of the SAFETEA-LU that State and MPO transportation plans and programs adopted on or after July 1, 2007, shall reflect the provisions in *23 U.S.C. 134* and *49 U.S.C. 5303* as amended by the SAFETEA-LU. In addition, this proposed section clarifies that all State, MPO, and FHWA/FTA actions on metropolitan transportation plans and programs taken on or after July 1, 2007 (*i.e.*, updates and amendments) are subject to the provisions in *23 U.S.C. 134* and *49 U.S.C. 5303* as amended by the SAFETEA-LU and these proposed rules. Provisions for early accommodation of SAFETEA-LU requirements, as well as its revised update cycles are described in this section.

Proposed paragraph (d) would establish that the congestion management process for newly designated TMAs shall be implemented within 18 months of the designation of the TMA. This requirement is consistent with previous joint guidance provided by the FHWA and the FTA entitled "Frequently Asked Questions on Applying 2000 Census Data to Urbanized and Urban Areas". n18

n18 Guidance issued on March 31, 2003, available via the Internet at the following URL: *http://www.fhwa.dot.gov/planning/census/faqa2cdt.htm.*

Appendix A--Linking the Transportation Planning and NEPA Processes

The agencies propose to include an Appendix A in the regulations discussing the mandated linkage between transportation planning and project development to amplify requirements in *23 U.S.C. 134* and 135 and in *49 U.S.C. 5303* and 5304 regarding this linkage.

Despite the statutory emphasis over the last 40 years directing that Federally funded highway and transit projects flow from metropolitan and statewide transportation planning processes, the environmental analyses produced to meet the requirements of the National Environmental Policy Act (NEPA) of 1969 *(42 U.S.C. 4231 et seq.)* have often been disconnected from the analyses used to develop long-range transportation plans, statewide and metropolitan Transportation Improvement Programs (STIPs/TIPs), planning-level corridor/subarea/feasibility studies, or FTA's planning Alternatives Analyses. Congress established a strong transportation planning process for a reason, so that it would lay a foundation and help shape project decisions. This Appendix reinforces how planning analyses and decisions should be relied on during the NEPA process. The Appendix presents environmental review as a continuum of sequential study, refinement, and expansion performed in transportation planning and during project development/NEPA, with information developed and conclusions drawn in early stages utilized in subsequent (and more detailed) review stages. The Appendix includes a "Questions and Answers" section that addresses common issues regarding linking the transportation planning and NEPA/project development processes.

Appendix B--Fiscal Constraint of Transportation Plans and Programs

The agencies propose to include Appendix B on fiscal constraint to amplify requirements in *23 U.S.C. 134* and 135 and in *49 U.S.C 5303* and 5304 associated with fiscal constraint. Appendix B summarizes and describes in detail the ISTEA and TEA-21 fiscal constraint requirements to ensure that transportation plans and programs reflect realistic assumptions on capital, operations, and maintenance costs associated with the surface transportation system. Appendix B explains how to estimate "reasonably available" future revenues and what is considered "Available or Committed" funds. The Appendix also describes how to address changes in revenues or costs after the metropolitan transportation plan, TIP, or STIP are adopted and the FHWA/FTA position on how operations or maintenance are to be covered by fiscal constraint analyses. The Appendix includes a "Questions and Answers" section that addresses common uncertainties [*33526] regarding different fiscal constraint situations.

Section 500.109 Congestion Management Systems (CMS)

The SAFETEA-LU amended *23 U.S.C. 134*(k)(3) and *49 U.S.C. 5303* to require that the planning process in a TMA include a congestion management "process" instead of a "system". This proposed rulemaking transfers the TMA congestion management "system" requirements from this section to § 450.320. The intent of moving the requirements from this section to § 450.320 is to reiterate the importance of the congestion management process to TMA transportation planning and programming and consolidate the TMA congestion management process requirement with the rest of the requirements for TMA planning processes.

Proposed paragraph (a) largely retains the language contained in existing § 500.109(a). The remaining portions of existing § 500.109 that pertain to congestion management in TMAs are proposed to be moved to § 450.320.

The phase-in period defined in existing § 500.109(d)(2) would be removed because it is no longer necessary.

49 CFR Part 613

This section would be revised to refer to the proposed regulations in 23 CFR part 450. Because the FHWA and the FTA jointly administer the transportation planning and programming process, we propose to keep the regulations identical.

Distribution Tables

For ease of reference, two distribution tables are provided. The first indicates proposed changes in section numbering and titles. The second provides details within each section.

Section Title and Number

Old section	New section
Subpart A	Subpart A
450.100 Purpose	450.100 Purpose.
450.102 Applicability	450.102 Applicability.
450.104 Definitions	450.104 Definitions.
Subpart B	Subpart B

Section Title and Number

Old section	New section
450.200 Purpose	450.200 Purpose.
450.202 Applicability	450.202 Applicability.
450.204 Definitions	450.204 Definitions.
450.206 Statewide transportation planning process: General requirements	450.206 Scope of the statewide transportation planning process.
450.208 Statewide transportation planning process: Factors	450.208 Coordination of planning process activities.
450.210 Coordination	450.210 Interested parties, public involvement, and consultation.
	450.212 Transportation planning studies and project development.
450.212 Public involvement	450.214 Development and content of the long-range statewide transportation plan.
450.214 Statewide transportation plan	450.216 Development and content of the statewide transportation improvement program (STIP).
450.216 Statewide transportation improvement program (STIP)	450.218 Self-certifications, Federal findings, and Federal approvals.
450.218 Funding	450.220 Project selection from the STIP.
450.220 Approvals	450.222 Applicability of NEPA to statewide transportation plans and programs.
450.222 Project selection for implementation	450.224 Phase-in of new requirements.
Subpart C	Subpart C
450.300 Purpose	450.300 Purpose.
450.302 Applicability	450.302 Applicability.
450.304 Definitions	450.304 Definitions.
450.306 Metropolitan planning organizations: Designation and redesignation	450.306 Scope of the metropolitan transportation planning process.
450.308 Metropolitan planning organization: Metropolitan planning boundary	450.308 Funding for transportation planning and unified planning work programs.
450.310 Metropolitan planning organization: planning agreements	450.310 Metropolitan planning organization designation and redesignation.
450.312 Metropolitan transportation planning: Responsibilities, cooperation, and coordination	450.312 Metropolitan planning area boundaries.
450.314 Metropolitan transportation planning process: Unified planning work programs	450.314 Metropolitan planning agreements.
450.316 Metropolitan transportation planning process: Elements	450.316 Interested parties, participation and consultation.

Section Title and Number

Old section	New section
450.318 Metropolitan transportation planning process: Major metropolitan transportation investments	450.318 Transportation planning studies and project development.
450.320 Metropolitan transportation planning process: Relation to management systems	450.320 Congestion management process in transportation management areas.
450.322 Metropolitan transportation planning process: Transportation plan	450.322 Development and content of the metropolitan transportation plan.
450.324 Transportation improvement program: General	450.324 Development and content of the transportation improvement program (TIP).
450.326 Transportation improvement program: modification	450.326 TIP revisions and relationship to the STIP.
450.328 Transportation improvement program: Relationship to statewide TIP	450.328 TIP action by the FHWA and the FTA.
450.330 Transportation improvement program: Action required by FHWA/FTA	450.330 Project selection from the TIP.
450.332 Project selection for implementation	450.332 Annual listing of obligated projects.
450.334 Metropolitan transportation planning process: Certification	450.334 Self-certifications and Federal certifications.
450.336 Phase-in of new requirements	450.336 Applicability of NEPA to metropolitan transportation plans and programs.
None	450.338 Phase-in of new requirements.
Section 500	
500.109 CMS	500.109 CMS.

The following distribution table identifies details for each existing section and proposed section:

Old section	New section
Subpart A	Subpart A
450.100	450.100. [Revised].
450.102	450.102.
450.104	450.104.
Definitions	Definitions.
None	Administrative modification. [New].
None	Alternatives analysis. [New].
None	Amendment. [New].
None	Attainment area. [New].
None	Available funds. [New].
None	Committed funds. [New].
None	Conformity. [New].
None	Conformity lapse. [New].

Old section	New section
None	Congestion management process. [New].
None	Consideration. [New].
Consultation	Consultation. [Revised].
Cooperation	Cooperation. [Revised].
None	Coordinated public transit-human services transportation plan. [New].
Coordination	Coordination. [Revised].
None	Design concept. [New].
None	Design scope. [New].
None	Environmental mitigation activities. [New].
None	Federal land management agency. [New].
None	Federally funded non-emergency transportation services. [New].
None	Financially constrained or Fiscal constraint. [New].
None	Financial plan. [New].
None	Freight shippers. [New].
Governor	Governor.
None	Illustrative project. [New].
None	Indian Tribal government. [New].
None	Intelligent transportation system (ITS). [New].
None	Interim metropolitan transportation plan. [New].
None	Interim transportation improvement program (TIP). [New].
Maintenance area	Maintenance area. [Revised].
Major metropolitan transportation investment	Removed.
Management system	Management system. [Revised].
Metropolitan planning area	Metropolitan planning area. [Revised].
Metropolitan planning organization (MPO)	Metropolitan planning organization. (MPO). [Revised].
Metropolitan transportation plan	Metropolitan transportation plan.
None	National ambient air quality standards. [New].
Nonattainment area	Nonattainment area.
Non-metropolitan area	Non-metropolitan area.
Non-metropolitan local official	Non-metropolitan local official.
None	Obligated projects. [New].
None	Operational and management strategies. [New].
None	Project selection. [New].
None	Provider of freight transportation services. [New].
None	Regional ITS architecture.

Old section	New section
	[New].
None	Regional transit security strategy.
Regionally significant project	Regionally significant project. [Revised].
None	Revision. [New].
State	State.
State implementation plan (SIP)	State implementation plan (SIP). [Revised].
Statewide transportation improvement Program (STIP)	Statewide transportation improvement program (STIP).
Statewide transportation plan	Long-range statewide transportation plan. [Revised].
None	Strategic Highway Safety Plan. [New].
None	Transportation control measures (TCMs). [New].
Transportation improvement program (TIP)	Transportation improvement program (TIP). [Revised].
Transportation management area (TMA)	Transportation management area (TMA). [Revised].
None	Unified planning work program (UPWP). [New].
None	Update. [New].
None	Urbanized area. [New].
None	Users of public transportation. [New].
None	Visualization techniques. [New].
Subpart B	Subpart B
450.200	450.200. [Revised].
450.202	450.202. [Revised].
450.204	450.204. [Revised].
450.206(a)(1) through (a)(5)	Removed.
450.206(b)	450.208(a)(1). [Revised].
450.206(c)	450.208(a)(3).
450.208(a)(1)	450.208(d). [Revised].
450.208(a)(2) through (a)(23)	450.206(a)(1) through (a)(8). [Revised].
450.208(b)	450.206(b). [Revised].
None	450.206(c). [New].
450.210(a)(1) through (a)(13)	450.208(a)(1) through (a)(7). [Revised].
450.210(b)	Removed.
None	450.208(b). [New].
None	450.208(c). [New].
None	450.208(e). [New].
None	450.208(f). [New].
None	450.208(g). [New].
None	450.208(h). [New].
450.212(a) through (g)	450.210(a). [Revised].
450.212(h) through (i)	450.210(b)(1) through (b)(2). [Revised].
None	450.210(c). [New].

Old section	New section
None	450.212. [New].
450.214(a) through (b)(3)	450.214(a). [Revised].
None	450.214(b). [New].
450.214(b)(4)	450.214(e). [Revised].
450.214(b)(5)	450.214(c). [Revised].
450.214(b)(6)	450.214(k). [Revised].
None	450.214(d). [Revised].
None	450.214(e). [New].
450.214(c)(1) through (c)(5)	450.214(g) and (h). [Revised].
450.214(d)	Removed.
None	450.214(i). [New].
None	450.214(j). [New].
None	450.214(m). [New].
None	450.214(n). [New].
450.214(e)	450.214(o).
None	450.214(p). [New].
450.214(f)	450.214(f). [Revised].
450.216(a) last sentence	450.216(g). [Revised].
450.216(a)(1) through (a)(2)	450.216(a) through (b). [Revised].
450.216(a)(3)	450.216(k).
None	450.216(l). [New].
450.216(a)(4)	450.216(b). [Revised].
None	450.216(d). [New].
None	450.216(e). [New].
450.216(a)(5)	450.216(m). [Revised].
450.216(a)(6)	450.216(g). [Revised].
450.216(a)(7)	450.216(h). [Revised].
450.216(a)(8)	450.216(i). [Revised].
450.216(a)(9)	Removed.
450.216(b)	450.216(j). [Revised].
None	450.216(f). [New].
None	450.216(n). [New].
None	450.216(m). [New].
450.216(c) through (d)	450.216(o).
450.216(e)	450.216(c). [Revised].
450.218	450.206(d). [Revised].
450.220(a) through (g)	450.218(a) through (d). [Revised].
450.222(a) through (d)	450.220(a) through (e). [Revised].
None	450.222. [New].
450.224(a) through (b)	450.224(a) through (c). [Revised].
Subpart C	Subpart C
450.300	450.300. [Revised].
450.302	450.302. [Revised].
450.304	450.304. [Revised].
450.306(a) through (d)	450.310(a) through (d). [Revised].
None	450.310(f). [New].
450.306(e)	450.310(g).
None	450.310(h). [New].
450.306(f)	450.310(i). [Revised].

Old section	New section
450.306(g)	450.310(j). [Revised].
450.306(h)	450.310(e). [Revised].
450.306(i) through (j)	Removed.
450.306(k)	450.310(l) through (m). [Revised].
None	450.310(k). [New].
450.308(a) through (c)	450.312(a), (b), and (i). [Revised].
None	450.312(c). [New].
None	450.312(d). [New].
None	450.312(e). [New].
None	450.312(f). [New].
None	450.312(g). [New].
None	450.312(h). [New].
450.308(d)	450.312(j). [Revised].
450.310(a), (b), and (d)	450.314(a). [Revised].
None	450.314(a)(1). [New].
None	450.314(a)(2). [New].
450.310(c)	450.314(c).
450.310(e)	Removed.
450.310(f)	450.314(b). [Revised].
450.310(g)	450.314(d). [Revised].
450.310(h)	Removed.
None	450.314(f). [New].
450.312(a)	Removed.
450.312(b)	Removed.
450.312(c)	450.322(d). [Revised].
450.312(d)	Removed.
450.312(e)	450.314(e).
450.312(f)	450.306(i).
450.312(g)	Removed.
450.312(h)	Removed.
450.312(i)	450.316(c) through (d). [Revised].
None	450.316(e). [New].
None	450.308(a). [New].
450.314(a) through (d)	450.308(b) through (e). [Revised].
None	450.308(f). [New].
450.316(a)(1) through (a)(16)	450.306(a)(1) through (a)(8). [Revised].
None	450.306(b). [New].
None	450.306(c). [New].
None	450.306(d). [New].
None	450.306(e). [New].
None	450.306(f). [New].
None	450.306(g). [New].
None	450.306(h). [New].
None	450.316(a). [New].
450.316(b)(1)(i)	450.316(a)(3). [Revised].
450.316(b)(1)(ii) through (b)(1)(vi)	450.316(a)(1)(i) through (a)(1)(vi). [Revised].
450.316(b)(1)(vii)	450.316(a)(2)(). [Revised].
450.316(b)(1)(viii) through	450.316(a)(1)(vii) through

Old section	New section
(b)(1)(xi)	(a)(1)(x). [Revised].
450.316(b)(2)	Removed.
450.316(b)(3)	Removed.
450.316(b)(4)	Removed.
None	450.316(b). [New].
450.312(i)	450.316(c).
None	450.316(d). [New].
450.316(c)	450.306(j). [Revised].
450.316(d)	Removed.
450.318(a) through (f)	450.318(a) through (c). [Revised].
450.320(a) through (c)	450.320(a) through (f). [Revised].
450.322(a) and (e)	450.322(a) through (c). [Revised].
None	450.322(e). [New].
450.322(b)(1) through (b)(2)	450.322(f)(1) through (f)(2). [Revised].
450.322(b)(3)	450.322(f)(8). [Revised].
450.322(b)(4) through (b)(7)	450.322(f)(3) through (f)(6). [Revised].
450.322(b)(8)	Removed.
450.322(b)(9)	450.322(f)(7). [Revised].
450.322(b)(10)	Removed.
450.322(b)(11)	450.322(f)(8). [Revised].
None	450.322(g)(1) through (g)(2). [New].
None	450.322(h). [New].
450.322(c)	450.322(i). [Revised].
None	450.322(j). [New].
None	450.322(k). [New].
450.322(d)	450.322(l). [Revised].
450.324(a) through (n)	450.324(a) through (j). [Revised].
None	450.324(k). [New].
None	450.324(l). [New].
450.326	450.326(a). [Revised].
450.328(a) through (b)	450.326(b) through (c). [Revised].
450.330(a) through (b)	450.328(a) through (b). [Revised].
None	450.328(c) through (e). [New].
450.324(o)	450.328(f). [Revised].
450.332(a) through (e)	450.330(a) through (e). [Revised].
None	450.332(a) through (c). [New].
450.334(a) through (h)	450.334(a) through (b). [Revised].
None	450.336. [New].
450.336	450.338(a) through (d). [Revised].
500.109 (a) through (c)	500.109(a) through (b). [Revised].

Rulemaking Analyses and Notices

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

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

The FHWA and FTA have determined preliminarily that this rulemaking would be a significant regulatory action within the meaning of Executive Order 12866, and is significant under Department of Transportation regulatory policies and procedures because of substantial State, local government, congressional, and public interest. These interests involve receipt of Federal financial support for transportation investments, appropriate compliance with statutory requirements, and balancing of transportation mobility and environmental goals. The changes proposed herein would add new coordination and documentation requirements (*e.g.*, greater public outreach and consultation with State and local planning and resource agencies, annual listing of obligated projects, etc.), but would reduce the frequency of some existing regulatory reporting requirements (*e.g.*, metropolitan transportation plan, STIP/TIP, and certification reviews). In preparing this proposal, the FHWA and the FTA have sought to maintain existing flexibility of operation wherever possible for State DOTs, MPOs, and other affected organizations, and to utilize existing processes to accomplish any new tasks or activities.

The FHWA and the FTA have conducted a cost analysis identifying each of the proposed regulatory changes that would have a significant cost impact for MPOs or State DOTs, and have estimated those costs on an annual basis. This cost analysis is included as a separate document, entitled "Regulatory Cost Analysis of Proposed Rulemaking," and is available for review in the docket. Based on the cost analysis, we estimate that the aggregate increase in costs over current expenditures attributable to this rulemaking for all 52 State DOTs and 384 MPOs would be approximately $ 19.8 million per year, or about $ 46,000 per agency, on average. Eighty (80) percent of these costs are directly reimbursable through Federal transportation funds allocated for metropolitan planning. *[23 U.S.C. 104*(f) and *49 U.S.C. 5303*(h)] and for State planning and research *[23 U.S.C. 505* and *49 U.S.C. 5313]*. Furthermore, the SAFETEA-LU significantly increased the mandatory set-aside in Federal funds for metropolitan transportation planning, as well as Statewide Planning and Research funding. In addition, the State DOTs and MPOs have the flexibility to use most other Federal highway dollars for transportation planning if they so desire. Consequently, the increase in non-Federal cost burden attributable to this proposed rulemaking is estimated to be only $ 4 million per year in total, or about $ 9,100 per agency, on average. Therefore, we believe that the economic impact of this rulemaking would be minimal.

The FHWA and the FTA welcome comments on the economic impacts of these proposed regulations. Comments, including those from the State DOTs and MPOs, regarding specific burdens, impacts, and costs would be most welcome and would aid us in more fully appreciating the impacts of this ongoing planning process requirement. Hence, we encourage comments on all facets of this proposal regarding its costs, burdens, and impacts.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96-354; *5 U.S.C. 601*-612), the FHWA and the FTA have determined that States and metropolitan planning organizations are not included in the definition of small entity set forth in *5 U.S.C. 601*. Small governmental jurisdictions are limited to representations of populations of less than 50,000. Metropolitan planning organizations, by definition represent urbanized areas having a minimum population of 50,000. Therefore the Regulatory Flexibility Act does not apply.

Unfunded Mandates Reform Act of 1995

This proposed rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, March 22, 1995, 109 Stat. 48). This proposed rule will not result in the expenditure of non-Federal

funds by State, local, and Tribal governments, in the aggregate, or by the private sector, of $ 120.7 million in any one year *(2 U.S.C. 1532)*.

Additionally, the definition of "Federal mandate" in the Unfunded Mandates Reform Act excludes financial assistance of the type in which State, local, or Tribal governments have authority to adjust their participation in the program in accordance with changes [*33531] made in the program by the Federal government. The Federal-aid highway program and Federal Transit Act permit this type of flexibility to the States.

Executive Order 13132 (Federalism)

This proposed action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, and the FHWA and the FTA have determined that this proposed action would not have sufficient federalism implications to warrant the preparation of a Federalism assessment. The FHWA and the FTA have also determined that this proposed action would not preempt any State law or regulation or affect the States' ability to discharge traditional State governmental functions. Comment is solicited specifically on the Federalism implications of this proposal.

By letter dated November 29, 2005, the FHWA and the FTA solicited comments from the National Governors' Association (NGA) as representatives for the elected State officials on the Federalism implications of this proposed rule. n19 An identical letter was sent on the same date to several other organizations representing elected officials and Indian Tribal governments. These organizations were: the National Conference of State Legislators (NCSL), the American Public Works Association (APWA), the Association of Metropolitan Planning Organizations (AMPO), the National Association of Regional Councils (NARC), the National Association of Counties (NACO), the Conference of Mayors (COM), the National Association of City Transportation Officials (NACTO), and the National Congress of American Indians (NCAI).

n19 A copy of this letter is included in the docket.

In response to this letter, AMPO and NARC requested a meeting to discuss their Federalism concerns. On December 21, 2005, we met with representatives from AMPO and NARC. A summary of this meeting is available in the docket. Briefly, both AMPO and NARC expressed concern with the potential burdens that new requirements might have on MPOs, especially the smaller MPOs. In particular, AMPO and NARC were concerned with our implementation of the SAFETEA-LU provisions relating to public participation, congestion management process, and implementation of planning update cycles. During the meeting, the FHWA and the FTA indicated that we would consider the issues discussed at the meeting. In response to the concerns raised, we propose flexible public participation requirements in Section 450.316, recognizing the wide variations among MPO capabilities and needs. Regarding the implementation of planning update cycles, the FHWA and the FTA note that *23 U.S.C. 134*(b) and 135(b) and *49 U.S.C. 5303*(b) and 5304(b) state that "beginning July 1, 2007, State or metropolitan planning organization plan or program updates shall reflect changes made by this section." The FHWA and the FTA do not have the legal authority to allow flexibility with regard to this date.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Numbers 20.205, Highway Planning and Construction (or 20.217); 20.500, Federal Transit Capital Improvement Grants; 20.505, Federal Transit Technical Studies Grants; 20.507, Federal Transit Capital and Operating Assistance Formula Grants. The regulations implementing Executive Order 12372 regarding intergovernmental consultation in Federal programs and activities apply to these programs and were carried out as part of the outreach on the Federalism implications of this rulemaking. The FHWA and the FTA solicit comments on this issue.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) *(44 U.S.C. 3501 et seq.)*, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct, sponsor, or require through regulations. The FHWA and the FTA have determined that this proposal contains collection of information requirements for the purposes of the Paperwork Reduction Act. However, the FHWA and the FTA believe that any increases in burden hours per submission are more than offset by decreases in the frequency of collection for these information requirements.

The reporting requirements for metropolitan planning unified planning work programs (UPWPs), transportation plans, and transportation improvement programs (TIPs) are currently approved under OMB control number 2132-0529 (expiration date: 06/30/2007). The information reporting requirements for State planning work programs have been approved by the OMB under control number 2125-0039. The FTA conducted the analysis supporting this approval on behalf of both the FTA and the FHWA, since the regulations are jointly issued by both agencies. The reporting requirements for statewide transportation plans and programs are also approved under this same OMB control number. The information collection requirements addressed under the current OMB approval number (2132-0529) impose a total burden of 314,900 hours on the planning agencies that must comply with the requirements in the existing regulation. The FHWA and the FTA conducted an analysis of the change in burden hours attributed to the proposed rulemaking, based on estimates used in the submission for OMB approval. This analysis is included as a separate document entitled "Estimated Change in Reporting Burden Hours Attributable to Proposed Rulemaking", and is available for review in the docket. The analysis results are summarized below.

The creation and submission of required reports and documents have been limited to those specifically required by *23 U.S.C. 134* and 135 and in *49 U.S.C. 5303* and 5304 or essential to the performance of our findings, certifications and/or approvals. Under the proposed rulemaking, there would be no significant change in the submission requirements for UPWPs or State planning work programs; therefore there is no change in the annual reporting burden for this element. The proposed rulemaking would require that additional sections be added to the metropolitan and statewide transportation plans, which we estimate would increase the required level of effort by 20 percent over current plan development. However, the proposed rulemaking would also reduce the required frequency of plan submission from 3 to 4 years for MPOs located in nonattainment or maintenance areas. One half of all MPOs are located in nonattainment or maintenance areas and would realize a reduction in their annual reporting burden. Based on the burden hours used in the FTA analysis submitted for OMB approval, the decrease in burden hours for MPOs located in nonattainment and maintenance areas more than offsets the increase in burden hours associated with the new sections required in the plans.

The proposed rulemaking requires that State and metropolitan transportation improvement program (STIP and TIP) documents include 4 years of projects; an increase from 3 years of projects required under current regulations. We estimate that the inclusion of an additional year of projects would increase the reporting burden associated with TIP development by 10 percent over current levels. However, the proposed rulemaking would also reduce the [*33532] required frequency of TIP submission from 2 years to 4 years for all States and MPOs. Based on the burden hours used in the FTA analysis submitted for OMB approval, the decrease in burden hours associated with the reduced frequency of submission more than offsets the increase in burden hours associated with including an additional year of projects in the TIP.

Interested parties are invited to send comments regarding any aspect of this information collection, including, but not limited to: (1) Whether the collection of information is necessary for the performance of the functions of the FHWA and the FTA; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the collection of information; and (4) ways to minimize the collection burden without reducing the quality of the information collected.

National Environmental Policy Act

The FHWA and the FTA have analyzed this proposed action for the purpose of the National Environmental Policy Act of 1969 *(42 U.S.C. 4321),* and have determined that this proposed action would not have any effect on the quality of the environment.

Executive Order 12988 (Civil Justice Reform)

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

Executive Order 13045 (Protection of Children)

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

Executive Order 12630 (Taking of Private Property)

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

Executive Order 13175 (Tribal Consultation)

The FHWA and the FTA have analyzed this action under Executive Order 13175, dated November 6, 2000, and believe that the proposed action would not have substantial direct effects on one or more Indian Tribes; would not impose substantial direct compliance costs on Indian Tribal governments; and would not preempt Tribal laws. The planning regulations contain requirements for States to consult with Indian Tribal governments in the planning process. Tribes are required under 25 CFR 170 to develop long range plans and develop an Indian Reservation Roads (IRR) TIP for programming IRR projects. However, the requirements in 25 CFR part 170 would not be changed by this rulemaking. Therefore, a Tribal summary impact statement is not required.

Executive Order 13211 (Energy Effects)

We have analyzed this action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use dated May 18, 2001. We have determined that it is not a significant energy action under that order because although it is a significant regulatory action under Executive Order 12866, it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required.

Executive Order 12898 (Environmental Justice)

Executive Order 12898 requires that each Federal agency make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minorities and low-income populations. The FHWA and the FTA also believe that the requirements of Title VI of the Civil Rights Act of 1964 *(42 U.S.C. 2000d et seq.*) apply to this proposed rule. The FHWA and the FTA have preliminarily determined that this proposed rule does not raise any environmental justice issues. The agencies request comment on this assessment.

Regulation Identification Number

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

List of Subjects

23 CFR Parts 450 and 500

Grant programs--transportation, Highway and roads, Mass transportation, Reporting and recordkeeping requirements.

49 CFR Part 613

Grant programs--transportation, Highways and roads, Mass transportation, Reporting and recordkeeping requirements. In consideration of the foregoing, the FHWA and the FTA propose to revise title 23, Code of Federal Regulations, parts 450 and 500 and title 49, Code of Federal Regulations, part 613 as set forth below:

Title 23--Highways

1. Revise part 450 to read as follows:

PART 450--PLANNING ASSISTANCE AND STANDARDS

Subpart A--Transportation Planning and Programming Definitions

Sec.

450.100 Purpose.

450.102 Applicability.

450.104 Definitions.

Subpart B--Statewide Transportation Planning and Programming

450.200 Purpose.

450.202 Applicability.

450.204 Definitions.

450.206 Scope of the statewide transportation planning process.

450.208 Coordination of planning process activities.

450.210 Interested parties, public involvement, and consultation.

450.212 Transportation planning studies and project development.

450.214 Development and content of the long-range statewide transportation plan.

450.216 Development and content of the statewide transportation improvement program (STIP).

450.218 Self-certifications, Federal findings, and Federal approvals.

450.220 Project selection from the STIP.

450.222 Applicability of NEPA to statewide transportation plans and programs.

450.224 Phase-In of new requirements.

Subpart C--Metropolitan Transportation Planning and Programming

450.300 Purpose.

450.302 Applicability.

450.304 Definitions.

450.306 Scope of the metropolitan transportation planning process.

450.308 Funding for transportation planning and unified planning work programs.

450.310 Metropolitan planning organization designation and redesignation.

450.312 Metropolitan planning area boundaries.

450.314 Metropolitan planning agreements.

450.316 Interested parties, participation, and consultation. [*33533]

450.318 Transportation planning studies and project development.

450.320 Congestion management process in transportation management areas.

450.322 Development and content of the metropolitan transportation plan.

450.324 Development and content of the transportation improvement program (TIP).

450.326 TIP revisions and relationship to the STIP.

450.328 TIP action by the FHWA and the FTA.

450.330 Project selection from the TIP.

450.332 Annual listing of obligated projects.

450.334 Self-certifications and Federal certifications.

450.336 Applicability of NEPA to metropolitan transportation plans and programs.

450.338 Phase-in of new requirements.

Appendix A to part 450--Linking the transportation planning and NEPA processes.

Appendix B to part 450--Fiscal constraint of transportation plans and programs.

Authority: *23 U.S.C. 134*-135; *42 U.S.C. 7410 et seq.*; *49 U.S.C. 5303*-5304; *49 CFR 1.48* and *1.51*.

Subpart A--Transportation Planning and Programming Definitions

§ 450.100 Purpose.

The purpose of this subpart is to provide definitions for terms used in this part.

§ 450.102 Applicability.

The definitions in this subpart are applicable to this part, except as otherwise provided.

§ 450.104 Definitions.

Unless otherwise specified, the definitions in *23 U.S.C. 101*(a) and *49 U.S.C. 5302* are applicable to this part.

Administrative modification means a revision to a long-range statewide or metropolitan transportation plan, TIP, or STIP that is not significant enough to require public review and comment, redemonstration of fiscal constraint, or a conformity determination (in nonattainment and maintenance areas). Examples of administrative modifications include minor changes in the cost or initiation date of included projects.

Alternatives analysis (AA) means a study required for eligibility of funding under the Federal Transit Administration's (FTA's) Capital Investment Grant program *(49 U.S.C. 5309),* which includes an assessment of a range of alternatives designed to address a transportation problem in a corridor or subarea, resulting in sufficient information to support selection by State and local officials of a locally preferred alternative for adoption into a metropolitan transportation plan, and for the Secretary to make decisions to advance the locally preferred alternative through the project development process, as set forth in 49 CFR part 611 (Major Capital Investment Projects).

Amendment means a revision to a long-range statewide or metropolitan transportation plan, TIP, or STIP that is significant enough to require public review and comment, redemonstration of fiscal constraint, and/or a conformity determination (in nonattainment and maintenance areas). Examples of amendments include the addition or deletion of a regionally significant project, or a substantial change in the cost, design concept, or design scope of an included project.

Attainment area means any geographic area considered to have air quality that meets or exceeds the U. S. Environmental Protection Agency's (EPA's) health standards in the Clean Air Act, as amended *(42 U.S.C. 7401 et seq.*). An area may be an attainment area for one pollutant and a nonattainment area for others. A "maintenance area" (see definition below) is not considered an attainment area for transportation planning purposes.

Available funds means, for projects or project phases in the first two years of the metropolitan Transportation Improvement Program (TIP) and/or Statewide Transportation Improvement Program (STIP) in air quality nonattainment and maintenance areas, funds derived from an existing source dedicated to or historically used for transportation purposes. For Federal funds, authorized and/or appropriated funds and the extrapolation of formula and discretionary funds at historic rates of increase are considered "available." A similar approach may be used for State and local funds that are dedicated to or historically used for transportation purposes.

Committed funds means, for projects or project phases in the first two years of a TIP and/or STIP in air quality nonattainment and maintenance areas, funds that have been dedicated or obligated for transportation purposes. For State funds that are not dedicated to transportation purposes, only those funds over which the Governor has control may be considered "committed." Approval of a TIP by the Governor is considered a commitment of those funds over which the Governor has control. For local or private sources of funds not dedicated to or historically used for transportation purposes (including donations of property), a commitment in writing (*e.g.*, letter of intent) by the responsible official or body having control of the funds may be considered a commitment.

Conformity means the process to assess the compliance of a transportation plan, program, or project with the State Implementation Plan (SIP) for air quality. The conformity process is defined in the Clean Air Act, as amended *(42 U.S.C. 7401 et seq.*) and governed by the EPA under its transportation conformity rule (40 CFR part 93).

Conformity lapse means, pursuant to section 176(c) of the Clean Air Act *(42 U.S.C. 7506*(c)), as amended, that the conformity determination for a metropolitan transportation plan or TIP has expired and thus there is no currently conforming metropolitan transportation plan or TIP.

Congestion management process means a systematic approach required in transportation management areas (TMAs) that provides for effective management and operation, based on a cooperatively developed and implemented metropolitan-wide strategy, of new and existing transportation facilities eligible for funding under title 23, U.S.C., and title 49, U.S.C., through the use of operational management strategies.

Consideration means that one or more parties takes into account the opinions, action, and relevant information from other parties in making a decision or determining a course of action.

Consultation means that one or more parties confer with other identified parties in accordance with an established process and, prior to taking action(s), considers the views of the other parties and periodically informs them about action(s) taken.

Cooperation means that the parties involved in carrying out the transportation planning and programming processes work together to achieve a common goal or objective.

Coordinated public transit-human services transportation plan means a unified, comprehensive strategy for transit service delivery developed by public, private, and non-profit providers of transportation and human services, with participation by the public, including people with disabilities, older adults, and individuals with lower incomes, in order to minimize duplication and maximize collective coverage. The plan is a requirement under the FTA formula programs for the Elderly and Persons with Disabilities *(49 U.S.C. 5310),* Job Access and Reverse Commute *(49 U.S.C. 5316),* and New Freedom *(49 U.S.C. 5317),* but may include other Federal, State, or local programs. [*33534]

Coordination means the cooperative development of plans, programs, and schedules among agencies and entities with legal standing and adjustment of such plans, programs, and schedules to achieve general consistency, as appropriate.

Design concept means the type of facility identified for a transportation improvement project (*e.g.,* freeway, expressway, arterial highway, grade-separated highway, toll road, reserved right-of-way rail transit, mixed-traffic rail transit, or exclusive busway).

Design scope means the aspects that will affect the proposed facility's impact on the region, usually as they relate to vehicle or person carrying capacity and control (*e.g.,* number of lanes or tracks to be constructed or added, length of

project, signalization, safety features, access control including approximate number and location of interchanges, or preferential treatment for high-occupancy vehicles).

Environmental mitigation activities means strategies, policies, programs, actions, and activities that, over time, will serve to avoid, minimize, rectify, reduce, or compensate for (by replacing or providing substitute resources) the impacts to or disruption of elements of the human and natural environment associated with the implementation of a long-range statewide transportation plan or metropolitan transportation plan. The human and natural environment includes, for example, neighborhoods and communities, homes and businesses, cultural resources, parks and recreation areas, wetlands and water sources, forested and other natural areas, agricultural areas, endangered and threatened species, and the ambient air. The environmental mitigation strategies and activities are intended to be regional in scope, even though the mitigation may address potential project-level impacts. The environmental mitigation strategies and activities must be developed in consultation with Federal, State, and Tribal wildlife, land management, and regulatory agencies during the statewide and metropolitan transportation planning processes and be reflected in all adopted transportation plans.

Federal land management agency means units of Federal Government currently responsible for the administration of public lands (***e.g.,*** U.S. Forest Service, U.S. Fish and Wildlife Service, Bureau of Land Management, and the National Park Service).

Federally funded non-emergency transportation services means transportation services provided to the general public, including those with special transport needs, by public transit, private non-profit service providers, and private third-party contractors to public agencies.

Financially constrained or Fiscal Constraint means that each program year in the TIP and the STIP includes sufficient financial information for demonstrating that projects can be implemented using current and/or reasonably available revenues, by source, while the entire transportation system is being adequately operated and maintained. Additionally, projects in air quality nonattainment and maintenance areas can be included in the first two years of the TIP and STIP only if funds are "available or committed."

Financial plans means documentation required to be included with metropolitan transportation plans, TIPs, and STIPs that demonstrates the consistency between reasonable available and projected sources of Federal, State, local, and private revenues and the costs of implementing proposed transportation system improvements, as well as operating and maintaining the entire transportation system.

Freight shippers means any business that routinely transports its products from one location to another by providers of freight transportation services or by its own vehicle fleet.

Governor means the Governor of any of the 50 States or the Commonwealth of Puerto Rico or the Mayor of the District of Columbia.

Illustrative project means a transportation project that would be included in a metropolitan transportation plan, TIP, or STIP for which financial constraint had been demonstrated if reasonable additional resources beyond those identified in the financial plan were available.

Indian Tribal government means a duly formed governing body for an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian Tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, Public Law 103-454.

Intelligent transportation system (ITS) means electronics, photonics, communications, or information processing used singly or in combination to improve the efficiency or safety of a surface transportation system.

Interim metropolitan transportation plan means a transportation plan composed of projects eligible to proceed under a conformity lapse and otherwise meeting all other applicable provisions of this part, including approval by the MPO.

Interim transportation improvement program (TIP) means a TIP composed of projects eligible to proceed under a conformity lapse and otherwise meeting all other applicable provisions of this part, including approval by the MPO and the Governor.

Long-range statewide transportation plan means the official, statewide, multimodal, transportation plan covering a period of no less than 20 years developed through the statewide transportation planning process.

Maintenance area means any geographic region of the United States that the EPA previously designated as a nonattainment area for one or more pollutants pursuant to the Clean Air Act Amendments of 1990, and subsequently redesignated as an attainment area subject to the requirement to develop a maintenance plan under section 175(a) of the Clean Air Act, as amended.

Management system means a systematic process, designed to assist decisionmakers in selecting cost effective strategies/actions to improve the efficiency and safety of, and protect the investment in the nation's infrastructure. A management system includes identification of performance measures; data collection and analysis; determination of needs; evaluation, and selection of appropriate strategies/actions to address the needs; and evaluation of the effectiveness of the implemented strategies/actions.

Metropolitan planning area means the geographic area determined by agreement between the metropolitan planning organization (MPO) for the area and the Governor, in which the metropolitan transportation planning process is carried out.

Metropolitan planning organization (MPO) means the policy board of an organization created and designated to carry out the metropolitan transportation planning process.

Metropolitan transportation plan means the official multimodal transportation plan covering a period of no less than 20 years that is developed, adopted, and updated by the MPO through the metropolitan transportation planning process.

National ambient air quality standard (NAAQS) means those standards established pursuant to section 109 of the Clean Air Act.

Nonattainment area means any geographic region of the United States that has been designated by the EPA as a nonattainment area under section 107 of the Clean Air Act for any pollutants for which a NAAQS exists.

Non-metropolitan area means a geographic area outside designated metropolitan planning areas. [*33535]

Non-metropolitan local officials means elected and appointed officials of general purpose local government in a non-metropolitan area with responsibility for transportation.

Obligated projects means strategies and projects funded under title 23, U.S.C., and title 49, U.S.C., Chapter 53 for which the supporting Federal funds were authorized and committed by the State or designated recipient in the preceding program year.

Operational and management strategies means actions and strategies aimed at improving the performance of existing and planned transportation facilities to relieve vehicular congestion and maximizing the safety and mobility of people and goods.

Project selection means the procedures followed to advance projects from the first four years of an approved TIP and/or STIP to implementation, in accordance with agreed upon procedures.

Provider of freight transportation services means any business that transports or otherwise facilitates the movement of goods from one location to another for other businesses or for itself.

Regional ITS architecture means a regional framework for ensuring institutional agreement and technical integration for the implementation of ITS projects or groups of projects.

Regionally significant project means a transportation project (other than projects that may be grouped in the STIP or TIP pursuant to § 450.216 and § 450.324 or exempt projects as defined in EPA's transportation conformity regulation (40 CFR part 93) that is on a facility which serves regional transportation needs (such as access to and from the area outside the region; major activity centers in the region, major planned developments such as new retail malls, sports complexes, or employment centers; or transportation terminals) and would normally be included in the modeling of the metropolitan area's transportation network . At a minimum, this includes all capacity expanding projects on principal arterial highways and all fixed guideway transit facilities that offer a significant alternative to regional highway travel.

Regional transit security strategy means an overarching strategy for the region with mode-specific goals and objectives as they relate to prevention, detection, response, and recovery as a sustainable effort to protect regional transit systems' critical infrastructure from terrorism, with an emphasis on explosives and non-conventional threats that would cause major loss of life and severe disruption, as required by the Department of Homeland Security.

Revision means a change to a long-range statewide or metropolitan transportation plan, TIP, or STIP that occurs between scheduled periodic updates. A revision may or may not be significant. A significant revision is defined as an "amendment," while a non-significant revision is defined as an "administrative modification."

State means any one of the fifty states, the District of Columbia, or Puerto Rico.

State implementation plan (SIP) means an EPA--approved, State developed plan mandated by the Clean Air Act for air quality nonattainment areas that contains procedures to monitor, control, attain, maintain, and enforce compliance with the NAAQS.

Statewide transportation improvement program (STIP) means a statewide staged, at least four-year, multi-year program of transportation projects that is consistent with the long-range statewide transportation plan, metropolitan transportation plans, and TIPs, and required for projects to be eligible for funding under 23 U.S.C. and 49 U.S.C. Chapter 53.

Strategic highway safety plan means a plan developed by the State DOT in accordance with the requirements of *23 U.S.C. 148*(a)(6).

Transportation control measure (TCM) means any measure that is specifically identified and committed to in the applicable SIP that is either one of the types listed in section 108 of the Clean Air Act or any other measure for the purpose of reducing emissions or concentrations of air pollutants from transportation sources by reducing vehicle use or changing traffic flow or congestion conditions. Notwithstanding the above, vehicle technology-based, fuel-based, and maintenance-based measures that control the emissions from vehicles under fixed traffic conditions are not TCMs.

Transportation improvement program (TIP) means a staged, at least four-year, multi-year program of projects developed and formally adopted by an MPO as part of the metropolitan transportation planning process that is consistent with the metropolitan transportation plan, and required for projects to be eligible for funding under 23 U.S.C. and 49 U.S.C. Chapter 53.

Transportation management area (TMA) means an urbanized area with a population over 200,000, as defined by the Bureau of the Census and designated by the Secretary of Transportation, or any additional area where TMA designation is requested by the Governor and the MPO and designated by the Secretary of Transportation.

Unified planning work program (UPWP) means a statement of work identifying the planning priorities and activities to be carried out within a metropolitan planning area. At a minimum, a UPWP includes a description of the planning work and resulting products, who will perform the work, time frames for completing the work, the cost of the work, and the source(s) of funds.

Update means a complete change to a long-range statewide or metropolitan transportation plan, TIP, or STIP in order to meet the regular schedule as prescribed by Federal statute. Updates always require public review and comment, demonstration of fiscal constraint (except for long-range statewide transportation plans), and a conformity determination (in nonattainment and maintenance areas).

Urbanized area means a geographic area with a population of 50,000 or more, as designated by the Bureau of the Census.

Users of public transportation means any person, or groups representing such persons, who use transportation open to the general public, other than taxis and other privately funded and operated vehicles.

Visualization techniques means methods employed by States and MPOs in the development of transportation plans and programs with the public, elected and appointed officials, and other stakeholders in a clear and easily accessible format such as maps, pictures, and/or displays, to promote improved understanding of existing or proposed transportation plans and programs.

Subpart B--Statewide Transportation Planning and Programming

§ 450.200 Purpose.

The purpose of this subpart is to implement the provisions of *23 U.S.C. 135* and *49 U.S.C. 5304*, as amended, which require each State to carry out a continuing, cooperative, and comprehensive statewide multimodal transportation planning process, including the development of a long-range statewide transportation plan and statewide transportation improvement program (STIP), that facilitates the safe and efficient management, operation, and development of surface

transportation systems that will serve the mobility needs of people and freight (including accessible pedestrian walkways and bicycle transportation facilities) and that fosters economic growth and development within and between States and urbanized areas, while minimizing transportation-related [*33536] fuel consumption and air pollution in all areas of the State, including those areas subject to the metropolitan transportation planning requirements of *23 U.S.C. 134* and *49 U.S.C. 5303.*

§ 450.202 Applicability.

The provisions of this subpart are applicable to States and any other organizations or entities (*e.g.*, metropolitan planning organizations (MPOs) and public transportation operators) that are responsible for satisfying the requirements for transportation plans and programs throughout the State pursuant to *23 U.S.C. 135* and *49 U.S.C. 5304.*

§ 450.204 Definitions.

Except as otherwise provided in subpart A of this part, terms defined in *23 U.S.C. 101*(a) and *49 U.S.C. 5302* are used in this subpart as so defined.

§ 450.206 Scope of the statewide transportation planning process.

(a) Each State shall carry out a continuing, cooperative, and comprehensive statewide transportation planning process that provides for consideration and implementation of projects, strategies, and services that will address the following factors:

(1) Support the economic vitality of the United States, the States, metropolitan areas, and non-metropolitan areas, especially by enabling global competitiveness, productivity, and efficiency;

(2) Increase the safety of the transportation system for all motorized and non-motorized users;

(3) Increase the ability of the transportation system to support homeland security and to safeguard the personal security of all motorized and non-motorized users;

(4) Increase accessibility and mobility of people and freight;

(5) Protect and enhance the environment, promote energy conservation, improve the quality of life, and promote consistency between transportation improvements and State and local planned growth and economic development patterns;

(6) Enhance the integration and connectivity of the transportation system, across and between modes throughout the State, for people and freight;

(7) Promote efficient system management and operation; and

(8) Emphasize the preservation of the existing transportation system.

(b) Consideration of the planning factors in paragraph (a) of this section shall be reflected, as appropriate, in all aspects of the statewide transportation planning process, including activities such as the formulation of goals, objectives, performance measures, and evaluation criteria for use in developing the long-range statewide transportation plan; identification of prioritization criteria for projects and strategies reflected in the STIP; and development of short-range planning studies, strategic planning and/or policy studies, or transportation needs studies.

(c) The failure to consider any factor specified in paragraph (a) of this section shall not be reviewable by any court in any matter affecting a long-range statewide transportation plan, STIP, project or strategy, or the FHWA/FTA planning process findings.

(d) Funds provided under *23 U.S.C. 505* and *49 U.S.C. 5305*(e) are available to the State to accomplish activities in this subpart. At the State's option, funds provided under *23 U.S.C. 104*(b)(1) and (3) and 105 and *49 U.S.C. 5307* may also be used. Statewide transportation planning activities performed with funds provided under title *23, U.S.C., and 49* U.S.C., Chapter 53 shall be documented in a statewide planning work program in accordance with the provisions of 23 CFR part 420. The work program should include a discussion of the transportation planning priorities facing the State.

§ 450.208 Coordination of planning process activities.

(a) In carrying out the statewide transportation planning process, each State shall:

(1) Coordinate planning carried out under this subpart with the metropolitan transportation planning activities carried out under subpart C of this part for metropolitan areas of the State. The State is encouraged to rely on information, studies, or analyses provided by MPOs for portions of the transportation system located in metropolitan planning areas;

(2) Coordinate planning carried out under this subpart with statewide trade and economic development planning activities and related multistate planning efforts;

(3) Coordinate planning carried out under this subpart with planning by Federal land management agencies that have jurisdiction over land within the boundaries of the State;

(4) Consider the concerns of local elected and appointed officials with responsibilities for transportation in non-metropolitan areas;

(5) Consider the concerns of Indian Tribal governments that have jurisdiction over land within the boundaries of the State;

(6) Coordinate transportation plans, programs, and planning activities with related planning activities being conducted outside of metropolitan planning areas and between States; and

(7) Establish a forum for coordinating data collection and analyses to support statewide transportation planning and programming priorities and decisions.

(b) The State air quality agency shall coordinate with the State department of transportation (State DOT) to develop the transportation portion of the State Implementation Plan (SIP) consistent with the Clean Air Act *(42 U.S.C. 7401 et seq.*).

(c) Two or more States may enter into agreements or compacts, not in conflict with any law of the United States, for cooperative efforts and mutual assistance in support of activities under this subpart related to interstate areas and localities in the States and establishing authorities the States consider desirable for making the agreements and compacts effective. However, the U. S. Congress reserves the right to alter, amend, or repeal interstate compacts entered into under this part.

(d) States may use any one or more of the management systems (in whole or in part) described in 23 CFR part 500.

(e) States are encouraged to apply asset management principles and techniques in establishing planning goals, defining STIP priorities, and assessing transportation investment decisions, including transportation system safety, operations, preservation, and maintenance.

(f) The statewide transportation planning process shall be consistent with the development of applicable regional intelligent transportation systems (ITS) architectures, as defined in 23 CFR part 940.

(g) The statewide transportation planning process should be consistent with the development of Coordinated Public Transit-Human Services Transportation Plans, as required by *49 U.S.C. 5310,* 5316, and 5317.

(h) The statewide transportation planning process should be consistent with the Strategic Highway Safety Plan, as specified in *23 U.S.C. 148,* and the Regional Transit Security Strategy as required by the Department of Homeland Security.

§ 450.210 Interested parties, public involvement, and consultation.

(a) In carrying out the statewide transportation planning process, including development of the long-range statewide transportation plan and the STIP, the State shall develop and use a documented public involvement [*33537] process that provides opportunities for public review and comment at key decision points.

(1) The State's public involvement process at a minimum shall:

(i) Establish early and continuous public involvement opportunities that provide timely information about transportation issues and decisionmaking processes to citizens, affected public agencies, representatives of public transportation employees, freight shippers, private providers of transportation, representatives of users of public transportation, representatives of users of pedestrian walkways and bicycle transportation facilities, representatives of the disabled, providers of freight transportation services, and other interested parties;

(ii) Provide reasonable public access to technical and policy information used in the development of the long-range statewide transportation plan and the STIP;

(iii) Provide adequate public notice of public involvement activities and time for public review and comment at key decision points, including but not limited to a reasonable opportunity to comment on the proposed long-range statewide transportation plan and STIP;

(iv) To the maximum extent practicable, ensure that public meetings are held at convenient and accessible locations and times;

(v) To the maximum extent practicable, use visualization techniques to describe the proposed long-range statewide transportation plan and supporting studies;

(vi) To the maximum extent practicable, make public information available in electronically accessible format and means, such as the World Wide Web, as appropriate to afford reasonable opportunity for consideration of public information;

(vii) Demonstrate explicit consideration and response to public input during the development of the long-range statewide transportation plan and STIP;

(viii) Include a process for seeking out and considering the needs of those traditionally underserved by existing transportation systems, such as low-income and minority households, who may face challenges accessing employment and other services; and

(ix) Provide for the periodic review of the effectiveness of the public involvement process to ensure that the process provides full and open access to all interested parties and revise the process, as appropriate.

(2) The State shall provide for public comment on existing and proposed processes for public involvement in the development of the long-range statewide transportation plan and the STIP. At a minimum, the State shall allow 45 calendar days for public review and written comment before the procedures and any major revisions to existing procedures are adopted. The State shall provide copies of the approved public involvement process document(s) to the FHWA and the FTA for informational purposes.

(b) The State shall provide for non-metropolitan local official participation in the development of the long-range statewide transportation plan and the STIP. The State shall have a documented process(es) for consulting with non-metropolitan local officials representing units of general purpose local government and/or local officials with responsibility for transportation that is separate and discrete from the public involvement process and provides an opportunity for their participation in the development of the long-range statewide transportation plan and the STIP. Although the FHWA and the FTA shall not review or approve this consultation process(es), copies of the process document(s) shall be provided to the FHWA and the FTA for informational purposes.

(1) At least once every five years (as of February 24, 2006), the State shall review and solicit comments from non-metropolitan local officials and other interested parties for a period of not less than 60 calendar days regarding the effectiveness of the consultation process and any proposed revisions. A specific request for comments shall be directed to the State association of counties, State municipal league, regional planning agencies, or directly to non-metropolitan local officials.

(2) The State, at its discretion, shall be responsible for determining whether to adopt any proposed revisions. If a proposed revision is not adopted, the State shall make publicly available its reasons for not accepting the proposed revision, including notification to non-metropolitan local officials or their associations.

(c) For each area of the State under the jurisdiction of an Indian Tribal government, the State shall develop the long-range statewide transportation plan and STIP in consultation with the Tribal government and the Secretary of Interior. States are encouraged to develop a documented process(es) that outlines roles, responsibilities, and key decision points for consulting with Indian Tribal governments and Federal land management agencies in the development of the long-range statewide transportation plan and the STIP.

§ 450.212 Transportation planning studies and project development.

(a) An MPO(s), State(s), and/or public transportation operator(s) may undertake a corridor or subarea planning study as part of the statewide transportation planning process. The results of these transportation planning studies may

be incorporated into the overall project development process to the extent that they meet the requirements of the National Environmental Policy Act (NEPA) of 1969 *(42 U.S.C. 4321 et seq.*) and associated implementing regulations (23 CFR part 771 and 40 CFR parts 1500-1508). Specifically, these corridor or subarea studies maybe used to produce any of the following for a proposed transportation project:

(1) Purpose and need or goals and objective statement(s);

(2) General travel corridor and/or general mode(s) definition (i.e., highway, transit, or a highway/transit combination);

(3) Preliminary screening of alternatives and elimination of unreasonable alternatives;

(4) Description of the affected environment; and/or

(5) Preliminary identification of environmental impacts and environmental mitigation.

(b) Publicly available documents produced by, or in support of, the transportation planning process described in this subpart may be incorporated by reference into subsequent NEPA documents, in accordance with *40 CFR 1502.21*, to the extent that:

(1) The NEPA lead agencies agree that such incorporation will aid in establishing or evaluating the purpose and need for the Federal action, reasonable alternatives, cumulative or other impacts on the human and natural environment, or mitigation of these impacts; and

(2) The corridor or subarea planning study is conducted with:

(i) Involvement of interested State, local, Tribal, and Federal agencies;

(ii) Public review;

(iii) Continual opportunity to comment during the metropolitan transportation planning process and development of the corridor or subarea planning study;

(iv) Documentation of relevant decisions in a form that is identifiable and available for review during the NEPA scoping process and can be appended to or referenced in the NEPA document; and

(v) The review of the FHWA and the FTA, as appropriate. [*33538]

(c) By agreement of the NEPA lead agencies, the above integration may be accomplished through incorporating the subarea or corridor planning study into the draft Environmental Impact Statement or Environmental Assessment and other means of incorporation by reference that the NEPA lead agencies deem appropriate. Additional details on linkages between the transportation planning and project development/NEPA processes is contained in Appendix A to this part.

§ 450.214 Development and content of the long-range statewide transportation plan.

(a) The State shall develop a long-range statewide transportation plan, with a minimum 20-year forecast period, that provides for the development and implementation of the multimodal transportation system for the State. The long-range statewide transportation plan shall consider and include, as applicable, elements and connections between public transportation, non-motorized modes, rail, commercial motor vehicle, waterway, and aviation facilities, particularly with respect to intercity travel.

(b) The long-range statewide transportation plan should include capital, operations and management strategies, investments, procedures, and other measures to ensure the preservation and most efficient use of the existing transportation system.

(c) The long-range statewide transportation plan shall reference, summarize, or contain any applicable short-range planning studies; strategic planning and/or policy studies; transportation needs studies; management systems reports; emergency relief and disaster preparedness plans; and any statements of policies, goals, and objectives on issues (e.g., transportation, safety, economic development, social and environmental effects, or energy) that were relevant to the development of the long-range statewide transportation plan.

(d) The long-range statewide transportation plan should include a safety element that incorporates or summarizes the priorities, goals, countermeasures, or projects contained in the Strategic Highway Safety Plan required by *23 U.S.C. 148.*

(e) The long-range statewide transportation plan should include a security element that incorporates or summarizes the priorities, goals, or projects set forth in the Regional Transit Security Strategy(ies), as required by the Department of Homeland Security.

(f) Within each metropolitan area of the State, the long-range statewide transportation plan shall be developed in cooperation with the affected MPOs.

(g) For non-metropolitan areas, the long-range statewide transportation plan shall be developed in consultation with affected non-metropolitan officials with responsibility for transportation using the State's consultation process(es) established under § 450.210(b).

(h) For each area of the State under the jurisdiction of an Indian Tribal government, the long-range statewide transportation plan shall be developed in consultation with the Tribal government and the Secretary of the Interior consistent with § 450.210(c).

(i) The long-range statewide transportation plan shall be developed, as appropriate, in consultation with State, Tribal, and local agencies responsible for land use management, natural resources, environmental protection, conservation, and historic preservation. This consultation shall involve comparison of transportation plans to State and Tribal conservation plans or maps, if available, and comparison of transportation plans to inventories of natural or historic resources, if available.

(j) A long-range statewide transportation plan shall include a discussion of potential environmental mitigation activities and potential areas to carry out these activities, including activities that may have the greatest potential to restore and maintain the environmental functions affected by implementation of the plan. The discussion shall be developed in consultation with Federal, State, and Tribal land management, wildlife, and regulatory agencies. The State may establish reasonable timeframes for performing this consultation. Additional information on linkages between the transportation planning and project development/NEPA processes is contained in Appendix A to this part.

(k) In developing and updating the long-range statewide transportation plan, the State shall provide citizens, affected public agencies, representatives of public transportation employees, freight shippers, private providers of transportation, representatives of users of public transportation, representatives of users of pedestrian walkways and bicycle transportation facilities, representatives of the disabled, providers of freight transportation services, and other interested parties with a reasonable opportunity to comment on the proposed long-range statewide transportation plan. In carrying out these requirements, the State shall, to the maximum extent practicable, utilize the public involvement process described under § 450.210(a).

(l) The long-range statewide transportation plan may include a financial plan that demonstrates how the adopted long-range statewide transportation plan can be implemented, indicates resources from public and private sources that are reasonably expected to be made available to carry out the plan, and recommends any additional financing strategies for needed projects and programs. The financial plan may include, for illustrative purposes, additional projects that would be included in the adopted long-range statewide transportation plan if additional resources beyond those identified in the financial plan were available.

(m) The State shall not be required to select any project from the illustrative list of additional projects included in the financial plan described in paragraph (k) of this section.

(n) The long-range statewide transportation plan shall be published or otherwise made available, including (to the maximum extent practicable) in electronically accessible formats and means, such as the World Wide Web, as described in § 450.210(a).

(o) The State shall continually evaluate, revise, and periodically update the long-range statewide transportation plan, as appropriate, using the procedures in this section for development and establishment of the long-range statewide transportation plan.

(p) Copies of any new or revised long-range statewide transportation plan documents shall be provided to the FHWA and the FTA for informational purposes.

§ 450.216 Development and content of the statewide transportation improvement program (STIP).

(a) The State shall develop a statewide transportation improvement program (STIP) for all areas of the State. The STIP shall cover a period of not less than four years and be updated at least every four years, or more frequently if the

Governor elects a more frequent update cycle. If the STIP covers more than four years, the FHWA and the FTA will consider the projects in the additional years as informational. In case of difficulties developing a portion of the STIP for a particular area (e.g., metropolitan planning area, nonattainment or maintenance area, or Indian Tribal lands), a partial STIP covering the rest of the State may be developed. [*33539]

(b) For each metropolitan area in the State, the STIP shall be developed in cooperation with the MPO designated for the metropolitan area. Each metropolitan transportation improvement program (TIP) shall be included without change in the STIP, directly or by reference, after approval of the TIP by the MPO and the Governor. A metropolitan TIP in a nonattainment or maintenance area is subject to an FHWA/FTA conformity finding before inclusion in the STIP. In areas outside a metropolitan planning area but within an air quality nonattainment or maintenance area containing any part of a metropolitan area, projects must be consistent with the regional emissions analysis that supported the conformity determination of the associated metropolitan TIP.

(c) For each non-metropolitan area in the State, the STIP shall be developed in consultation with affected non-metropolitan local officials with responsibility for transportation using the State's consultation process(es) established under § 450.210.

(d) For each area of the State under the jurisdiction of an Indian Tribal government, the STIP shall be developed in consultation with the Tribal government and the Secretary of the Interior.

(e) Federal Lands Highway program TIPs shall be included without change in the STIP, directly or by reference, once approved by the FHWA pursuant to *23 U.S.C. 204*(a) or (j).

(f) The Governor shall provide all interested parties with a reasonable opportunity to comment on the proposed STIP as required by § 450.210(a).

(g) The STIP shall include federally supported capital and non-capital surface transportation projects (or phases of projects) within the boundaries of the State proposed for funding under title 23, U.S.C., and title 49, U.S.C., Chapter 53 (including transportation enhancements; Federal Lands Highway program projects; safety projects included in the State's Strategic Highway Safety Plan; trails projects; pedestrian walkways; and bicycle facilities), but excluding:

(1) Safety projects funded under *49 U.S.C. 31102;*

(2) Metropolitan planning projects funded under *23 U.S.C. 104*(f), *49 U.S.C. 5305*(d), and *49 U.S.C. 5339;*

(3) State planning and research projects funded under *23 U.S.C. 505* and *49 U.S.C. 5305*(e);

(4) At the State's discretion, State planning and research projects funded with National Highway System, Surface Transportation Program, and/or Equity Bonus funds;

(5) Emergency relief projects (except those involving substantial functional, locational, or capacity changes);

(6) National planning and research projects funded under *49 U.S.C. 5314;* and

(7) Project management oversight projects funded under *49 U.S.C. 5327.*

(h) The STIP shall contain all regionally significant projects requiring an action by the FHWA or the FTA whether or not the projects are to be funded with 23 U.S.C., Chapters 1 and 2 or title 49, U.S.C., Chapter 53 funds (*e.g.*, addition of an interchange to the Interstate System with State, local, and/or private funds, and congressionally designated projects not funded under title 23, U.S.C., or title 49, U.S.C., Chapter 53). For informational purposes, the STIP should include all regionally significant projects proposed to be funded with Federal funds other than those administered by the FHWA or the FTA. In addition, the STIP should include, for informational purposes (if appropriate and included in any TIPs), all regionally significant projects to be funded with non-Federal funds.

(i) The STIP shall include for each project or phase (*e.g.*, preliminary engineering, environment/NEPA, right-of-way, design, or construction) the following:

(1) Sufficient descriptive material (*i.e.*, type of work, termini, and length) to identify the project or phase;

(2) Estimated total project cost, or a project cost range, which may extend beyond the four years of the STIP;

(3) The amount of funds proposed to be obligated during each program year for the project or phase, by sources of Federal and non-Federal funds; and

(4) Identification of the agencies responsible for carrying out the project or phase.

(j) Projects that are not considered to be of appropriate scale for individual identification in a given program year may be grouped by function, work type, and/or geographic area using the applicable classifications under *23 CFR 771.117(c)* and (d) and/or 40 CFR part 93. In nonattainment and maintenance areas, classifications must be consistent with the "exempt project" classifications contained in the EPA's transportation conformity regulation (40 CFR part 93). In addition, projects proposed for funding under title 23, U.S.C., Chapter 2 that are not regionally significant may be grouped in one line item or identified individually in the STIP.

(k) Each project or project phase included in the STIP shall be consistent with the long-range statewide transportation plan developed under § 450.214 and, in metropolitan planning areas, consistent with an approved metropolitan transportation plan developed under § 450.322.

(l) The STIP may include a financial plan that demonstrates how the approved STIP can be implemented, indicates resources from public and private sources that are reasonably expected to be made available to carry out the STIP, and recommends any additional financing strategies for needed projects and programs. The financial plan may include, for illustrative purposes, additional projects that would be included in the adopted STIP if reasonable additional resources beyond those identified in the financial plan were available. The State is not required to select any project from the illustrative list for implementation, and projects on the illustrative list cannot be advanced to implementation without an action by the FHWA and the FTA on the STIP. Additional criteria for STIP financial constraint and financial plans that support the STIP are contained in Appendix B to this part.

(m) The STIP shall include a project, or an identified phase of a project, only if full funding can reasonably be anticipated to be available for the project within the time period contemplated for completion of the project. In nonattainment and maintenance areas, projects included in the first two years of the STIP shall be limited to those for which funds are available or committed. Financial constraint of the STIP shall be demonstrated and maintained by year and shall include sufficient financial information to demonstrate which projects are to be implemented using current and/or reasonably available revenues, by source, and which projects are to be implemented using proposed revenue sources while the entire transportation system is being adequately operated and maintained. In the case of proposed funding sources, strategies for ensuring their availability shall be identified, preferably in the financial plan consistent with paragraph (l) of this section.

(n) In areas outside a metropolitan planning area but inside a nonattainment or maintenance area that contains any part of a metropolitan area, projects must be consistent with the regional emissions analysis that supported the conformity determination of the associated metropolitan TIP before they are added to the STIP.

(o) Projects in any of the first four years of the STIP may be advanced in place of another project in the first four [*33540] years of the STIP, subject to the project selection requirements of § 450.220. In addition, the STIP may be revised at any time under procedures agreed to by the State, MPO(s), and public transportation operator(s) consistent with the STIP development procedures established in this section, as well as the procedures for participation by interested parties (see § 450.210(a)), subject to FHWA/FTA approval (see § 450.218). All changes that affect fiscal constraint must take place by amendment of the STIP.

§ 450.218 Self-certifications, Federal findings, and Federal approvals.

(a) At least every four years, the State shall submit an updated STIP concurrently to the FHWA and the FTA for joint approval. STIP amendments shall also be submitted for joint approval. At the time the entire proposed STIP is submitted to the FHWA and the FTA for joint approval, the State shall certify that the transportation planning process is being carried out in accordance with all applicable requirements of:

(1) *23 U.S.C. 134* and 135, *49 U.S.C. 5303* and 5304, and this part;

(2) Title VI of the Civil Rights Act of 1964, as amended *(42 U.S.C. 2000d-1),* 49 CFR part 21, and 23 CFR parts 200 and 300;

(3) Section 1101(b) of the SAFETEA-LU (Pub. L. 109-59) and 49 CFR part 26 regarding the involvement of disadvantaged business enterprises in USDOT funded projects;

(4) The provisions of the Americans with Disabilities Act of 1990 *(42 U.S.C. 12101 et seq.*) and 49 CFR parts 27, 37, and 38;

(5) In States containing nonattainment and maintenance areas, sections 174 and 176(c) and (d) of the Clean Air Act, as amended *(42 U.S.C. 7504,* 7506(c) and (d)) and 40 CFR part 93;

(6) The Older Americans Act, as amended *(42 U.S.C. 6101),* prohibiting discrimination on the basis of age in programs or activities receiving Federal financial assistance;

(7) *Section 324 of title 23, U.S.C.*, regarding the prohibition of discrimination based on gender; and

(8) Section 504 of the Rehabilitation Act of 1973 *(29 U.S.C. 794)* and 49 CFR part 35 regarding discrimination against individuals with disabilities.

(b) The FHWA and the FTA shall review the STIP at least every four years, or at the time the amended STIP is submitted, (based on self-certifications and appropriate reviews established and conducted by the FHWA and the FTA) and make a joint finding on the extent to which the projects in the STIP are based on a statewide transportation planning process that meets or substantially meets the requirements of *23 U.S.C. 134* and 135, *49 U.S.C. 5303* and 5304, and subparts A, B, and C of this part. Approval of the STIP by the FHWA and the FTA, in its entirety or in part, will be based upon the results of this joint finding.

(1) If the FHWA and the FTA determine that the STIP or amended STIP are based on a statewide transportation planning process that meets or substantially meets the requirements of *23 U.S.C. 135, 49 U.S.C. 5304,* and this part, the FHWA and the FTA may jointly:

(i) Approve the entire STIP;

(ii) Approve the STIP subject to certain corrective actions being taken; or

(iii) Under special circumstances, approve a partial STIP covering only a portion of the State.

(2) If the FHWA and the FTA jointly determine and document in the planning finding that a submitted STIP or amended STIP does not substantially meet the requirements of *23 U.S.C. 135, 49 U.S.C. 5304,* and this part for any identified categories of projects, the FHWA and the FTA will not approve the STIP.

(c) The approval period for a new or amended STIP shall not exceed four years. If a State demonstrates, in writing, that extenuating circumstances will delay the submittal of a new or amended STIP, the FHWA and the FTA will consider and take appropriate action on a request to extend the approval beyond four years for all or part of the STIP for a period not to exceed 180 days. In these cases, priority consideration will be given to projects and strategies involving the operation and management of the multimodal transportation system. Where the request involves projects in a metropolitan planning area(s), the affected MPO(s) must concur in the request. If the delay was due to the development and approval of a metropolitan TIP(s), the affected MPO(s) must provide supporting information, in writing, for the request.

(d) Where necessary in order to maintain or establish transit operations, the FHWA and/or the FTA may approve operating assistance for specific projects or programs funded under *49 U.S.C. 5307,* 5311, 5316, and 5317, even though the projects or programs may not be included in an approved STIP.

§ 450.220 Project selection from the STIP.

(a) Except as provided in § 450.216(g) and § 450.218(d), only projects in a FHWA/FTA approved STIP shall be eligible for funds administered by the FHWA or the FTA.

(b) In metropolitan planning areas, transportation projects proposed for funds administered by the FHWA or the FTA shall be selected from the approved TIP/STIP in accordance with procedures established pursuant to the project selection portion of subpart C of this part.

(c) In non-metropolitan areas, transportation projects undertaken on the National Highway System, under the Bridge and Interstate Maintenance programs in title 23, U.S.C., and under sections 5310, 5311, 5316, and 5317 of title 49, U.S.C., Chapter 53 shall be selected from the approved STIP by the State in consultation with the affected non-metropolitan local officials with responsibility for transportation.

(d) Federal Lands Highway program projects shall be selected from the approved STIP in accordance with the procedures developed pursuant to *23 U.S.C. 204.*

(e) The projects in the first year of an approved STIP shall constitute an "agreed to" list of projects for subsequent scheduling and implementation. No further action under paragraphs (b) through (d) of this section is required for the

implementing agency to proceed with these projects. If Federal funds available are significantly less than the authorized amounts, or where there are significant shifting of projects between years, § 450.330(a) provides for a revised list of "agreed to" projects to be developed upon the request of the State, MPO, or public transportation operator(s). If an implementing agency wishes to proceed with a project in the second, third, or fourth year of the STIP, the procedures in paragraphs (b) through (d) of this section or expedited procedures that provide for the advancement of projects from the second, third, or fourth years of the STIP may be used, if agreed to by all parties involved in the selection process.

§ 450.222 Applicability of NEPA to statewide transportation plans and programs.

Any decision by the FHWA and the FTA concerning a long-range statewide transportation plan or STIP developed through the processes provided for in *23 U.S.C. 135* and *49 U.S.C. 5304* shall not be considered to be a Federal action subject to review under NEPA.

§ 450.224 Phase-in of new requirements.

(a) Prior to July 1, 2007, long-range statewide transportation plans and STIPs under development since August 10, 2005, may be completed under [*33541] TEA-21 requirements. Long-range statewide transportation plans and STIPs may also reflect the provisions of this part prior to July 1, 2007, but cannot take advantage of the extended update cycles (*e.g.*, four years for STIPs) until all provisions and requirements of this part are reflected in the long-range statewide transportation plan and STIP.

(b) For STIPs that are developed under TEA-21 requirements prior to July 1, 2007, the FHWA/FTA action (*i.e.*, conformity determinations and STIP approvals) must be completed no later than June 30, 2007. For long-range statewide transportation plans that are completed under TEA-21 requirements prior to July 1, 2007, the State adoption action must be completed no later than June 30, 2007. If these actions are completed on or after July 1, 2007, the provisions and requirements of this part shall take effect, regardless of when the long-range statewide transportation plan or the STIP were developed.

(c) In addition, the applicable action (see paragraph (b) of this section) on any amendments or updates to STIPs or long-range statewide transportation plans on or after July 1, 2007, shall be based on the provisions and requirements of this part.

Subpart C--Metropolitan Transportation Planning and Programming

§ 450.300 Purpose.

The purposes of this subpart are to implement the provisions of *23 U.S.C. 134* and *49 U.S.C. 5303*, as amended, which: (1) Sets forth the national policy that the MPO designated for each urbanized area is to carry out a continuing, cooperative, and comprehensive multimodal transportation planning process, including the development of a metropolitan transportation plan and a transportation improvement program (TIP), that encourages and promotes the safe and efficient development, management, and operation of surface transportation systems to serve the mobility needs of people and freight (including accessible pedestrian walkways and bicycle transportation facilities) and foster economic growth and development, while minimizing transportation-related fuel consumption and air pollution; and (2) encourages continued development and improvement of metropolitan transportation planning processes guided by the planning factors set forth in *23 U.S.C. 134*(h) and *49 U.S.C. 5303*(h).

§ 450.302 Applicability.

The provisions of this subpart are applicable to organizations and entities responsible for the transportation planning and programming processes in metropolitan planning areas.

§ 450.304 Definitions.

Except as otherwise provided in subpart A of this part, terms defined in *23 U.S.C. 101*(a) and *49 U.S.C. 5302* are used in this subpart as so defined.

§ 450.306 Scope of the metropolitan transportation planning process.

(a) The metropolitan transportation planning process shall be continuous, cooperative, and comprehensive, and provide for consideration and implementation of projects, strategies, and services that will address the following factors:

(1) Support the economic vitality of the metropolitan area, especially by enabling global competitiveness, productivity, and efficiency;

(2) Increase the safety of the transportation system for all motorized and non-motorized users;

(3) Increase the ability of the transportation system to support homeland security and to safeguard the personal security of all motorized and non-motorized users;

(4) Increase accessibility and mobility of people and freight;

(5) Protect and enhance the environment, promote energy conservation, improve the quality of life, and promote consistency between transportation improvements and State and local planned growth and economic development patterns;

(6) Enhance the integration and connectivity of the transportation system, across and between modes, for people and freight;

(7) Promote efficient system management and operation; and

(8) Emphasize the preservation of the existing transportation system.

(b) Consideration of the planning factors in paragraph (a) of this section should be reflected, as appropriate, in all aspects of the metropolitan transportation planning process, including activities such as the formulation of goals, objectives, performance measures, and evaluation criteria for use in developing the metropolitan transportation plan; identification of prioritization criteria for projects and strategies reflected in the TIP; and development of short-range planning studies, strategic planning and/or policy studies, or transportation needs studies.

(c) The failure to consider any factor specified in paragraph (a) of this section shall not be reviewable by any court in any matter affecting a metropolitan transportation plan, TIP, a project or strategy, or the certification of a metropolitan transportation planning process.

(d) The metropolitan transportation planning process shall be carried out in coordination with the statewide transportation planning process required by *23 U.S.C. 135* and *49 U.S.C. 5304.*

(e) In carrying out the metropolitan transportation planning process, MPOs, States, and public transportation operators are encouraged to apply asset management principles and techniques in establishing planning goals, defining TIP priorities, and assessing transportation investment decisions, including transportation system safety, operations, preservation, and maintenance, as well as strategies and policies to support homeland security and to safeguard the personal security of all motorized and non-motorized users.

(f) The metropolitan transportation planning process shall be consistent with the development of applicable regional intelligent transportation systems (ITS) architectures, as defined in 23 CFR part 940.

(g) The metropolitan transportation planning process should be consistent with the development of Coordinated Public Transit-Human Services Transportation Plans, as required by *49 U.S.C. 5310,* 5316, and 5317.

(h) The metropolitan transportation planning process should be consistent with the Strategic Highway Safety Plan, as specified in *23 U.S.C. 148,* and the Regional Transit Security Strategy, as required by the Department of Homeland Security.

(i) The FHWA and the FTA shall designate as a transportation management area (TMA) each urbanized area with a population of over 200,000 individuals, as defined by the Bureau of the Census. The FHWA and the FTA shall also designate any additional urbanized area as a TMA on the request of the Governor and the MPO designated for that area.

(j) In an urbanized area not designated as a TMA that is an air quality attainment area, the MPO(s) may propose and submit to the FHWA and the FTA for approval a procedure for developing an abbreviated metropolitan transportation plan and TIP. In developing proposed simplified planning procedures, consideration shall be given to whether the abbreviated metropolitan transportation plan and TIP will achieve the purposes of *23 U.S.C. 134, 49 U.S.C. 5303,* and these regulations, taking into account [*33542] the complexity of the transportation problems in the area. The simplified procedures shall be developed by the MPO in cooperation with the State(s) and public transportation operator(s).

§ 450.308 Funding for transportation planning and unified planning work programs.

(a) Funds provided under *23 U.S.C. 104*(f), *49 U.S.C. 5305*(d), *49 U.S.C. 5307*, and *49 U.S.C. 5339* are available to MPOs to accomplish activities in this subpart. At the State's option, funds provided under *23 U.S.C. 104*(b)(1) and (b)(3) and *23 U.S.C. 105* may also be provided to MPOs for metropolitan transportation planning. In addition, an MPO serving an urbanized area with a population over 200,000, as designated by the Bureau of the Census, may at its discretion use funds sub-allocated under *23 U.S.C. 133*(d)(3)(E) for metropolitan transportation planning activities.

(b) Metropolitan transportation planning activities performed with funds provided under title 23, U.S.C. and title 49, U.S.C., Chapter 53 shall be documented in a unified planning work program (UPWP) or simplified statement of work in accordance with the provisions of this section and 23 CFR part 420.

(c) Except as provided in paragraph (d) of this section, each MPO, in cooperation with the State(s) and public transportation operator(s), shall develop a UPWP that includes a discussion of the planning priorities facing the MPA. The UPWP shall identify work proposed for the next one or two-year period by major activity and task (including activities that address the planning factors in § 450.306(a)), in sufficient detail to indicate who (*e.g.*, MPO, State, public transportation operator, local government, or consultant) will perform the work, the schedule for completing the work, the resulting products, the proposed funding by activity/task, and a summary of the total amounts and sources of Federal and matching funds.

(d) With the prior approval of the State and the FHWA and the FTA, an MPO in an area not designated as a TMA may prepare a simplified statement of work, in cooperation with the State(s) and the public transportation operator(s), in lieu of a UPWP. A simplified statement of work would include a description of the major activities to be performed during the next one- or two-year period, who (*e.g.*, State, MPO, public transportation operator, local government, or consultant) will perform the work, the resulting products, and a summary of the total amounts and sources of Federal and matching funds. If a simplified statement of work is used, it may be submitted as part of the State's planning work program, in accordance with 23 CFR part 420.

(e) Arrangements may be made with the FHWA and the FTA to combine the UPWP or simplified statement of work with the work program(s) for other Federal planning funds.

(f) Administrative requirements for UPWPs and simplified statements of work are contained in 23 CFR part 420 and FTA Circular C8100.1B (Program Guidance and Application Instructions for Metropolitan Planning Grants).

§ 450.310 Metropolitan planning organization designation and redesignation.

(a) To carry out the metropolitan transportation planning process under this subpart, a metropolitan planning organization (MPO) shall be designated for each urbanized area with a population of more than 50,000 individuals (as determined by the Bureau of the Census).

(b) MPO designation shall be made by agreement between the Governor and units of general purpose local government that together represent at least 75 percent of the affected population (including the largest incorporated city, based on population, as named by the Bureau of the Census) or in accordance with procedures established by applicable State or local law.

(c) An MPO should be designated, to the extent possible, under specific State legislation, State enabling legislation, or by interstate compact, and shall have authority to carry out transportation planning for the entire area that it serves.

(d) When an MPO that serves a TMA is designated or redesignated, the MPO shall include local elected officials, officials of agencies that administer or operate major modes of transportation, and appropriate State transportation officials.

(e) To the extent possible, only one MPO should be designated for each urbanized area or group of contiguous urbanized areas. More than one MPO may be designated to serve an urbanized area only if the Governor(s) and the existing MPO, if applicable, determine that the size and complexity of the urbanized area make designation of more than one MPO appropriate. In those cases where two or more MPOs serve the same urbanized area, the MPOs shall establish official, written agreements that clearly identify areas of coordination and the division of transportation planning responsibilities among the MPOs.

(f) Nothing in this subpart shall be construed to interfere with the authority, under any State law in effect on December 18, 1991, of a public agency with multimodal transportation responsibilities to develop the metropolitan transportation plan and TIP for adoption by the MPO, or to develop long-range capital plans, coordinate transit services, and projects and carry out other activities pursuant to State law.

(g) Nothing in this subpart shall be deemed to prohibit an MPO from utilizing the staff resources of other agencies to carry out selected elements of the metropolitan transportation planning process.

(h) An MPO designation shall remain in effect until an official redesignation has been made in accordance with this section.

(i) An existing MPO may be redesignated only by agreement between the Governor and units of general purpose local government that together represent at least 75 percent of the existing metropolitan planning area population (including the largest incorporated city, based on population, as named by the Bureau of the Census).

(j) Redesignation of an MPO serving a multi-State metropolitan planning area requires agreement between the Governors of each State served by the existing MPO and units of general purpose local government that together represent at least 75 percent of the existing metropolitan planning area population (including the largest incorporated city, based on population, as named by the Bureau of the Census).

(k) For the purposes of redesignation, units of general purpose local government may be defined as either:

(1) The local elected officials currently serving on the MPO; or

(2) The elected officials from each unit of general purpose local government located within the metropolitan planning area served by the existing MPO.

(l) Redesignation of an MPO is required whenever the existing MPO determines that:

(1) There is a substantial change in the proportion of voting members on the existing MPO representing the largest incorporated city, other units of general purpose local government served by the MPO, and the State(s); or

(2) There is a substantial change in the decisionmaking authority or responsibility of the MPO, or in decisionmaking procedures established under MPO by-laws.

(m) The following changes to an MPO do not require a redesignation: [*33543]

(1) The identification of a new urbanized area (as determined by the Bureau of the Census) within an existing metropolitan planning area;

(2) Adding members to the MPO that represent new units of general purpose local government resulting from expansion of the metropolitan planning area;

(3) Adding members to satisfy the specific membership requirements for an MPO that serves a TMA; or

(4) Periodic rotation of members representing units of general-purpose local government, as established under MPO by-laws.

§ 450.312 Metropolitan planning area boundaries.

(a) The boundaries of a metropolitan planning area (MPA) shall be determined by agreement between the MPO and the Governor. At a minimum, the MPA boundaries shall encompass the entire existing urbanized area (as defined by the Bureau of the Census) plus the contiguous area expected to become urbanized within a 20-year forecast period for the metropolitan transportation plan. The MPA boundaries may be further expanded to encompass the entire metropolitan statistical area or combined statistical area, as defined by the Office of Management and Budget.

(b) If any of the urbanized area(s) served by the MPO lie within a nonattainment or maintenance area for ozone, carbon monoxide, or particulate matter as designated under the Clean Air Act *(42 U.S.C. 7401 et seq.*) as of August 10, 2005, the MPA boundaries in existence at that time shall be retained. However, the MPA boundaries may be adjusted by agreement of the Governor and affected MPOs to encompass the entire nonattainment or maintenance area by agreement of the Governor.

(c) An MPA boundary may encompass more than one urbanized area.

(d) The MPA boundaries may be established to coincide with the geography of regional economic development and growth forecasting areas.

(e) Identification of new urbanized areas within an existing metropolitan planning area by the Bureau of the Census shall not require redesignation of the existing MPO.

(f) Where the boundaries of the urbanized area or MPA extend across two or more States, the Governors with responsibility for a portion of the multistate area, MPO(s), and the public transportation operator(s) are strongly encouraged to coordinate transportation planning for the entire multistate area.

(g) The MPA boundaries shall not overlap with each other.

(h) Where part of an urbanized area served by one MPO extends into an adjacent MPA, the MPOs shall, at a minimum, establish written agreements that clearly identify areas of coordination and the division of transportation planning responsibilities among and between the MPOs. Alternatively, the MPOs may adjust their existing boundaries so that the entire urbanized area lies within only one MPA. Boundary adjustments that significantly change the composition of the MPO may require redesignation of one or more such MPOs.

(i) The MPA boundaries shall be reviewed after each Census by the MPO (in cooperation with the State and public transportation operator(s)) to determine if existing MPA boundaries meet the minimum statutory requirements for new and updated urbanized area(s), and shall be adjusted as necessary. As appropriate, additional adjustments should be made to reflect the most comprehensive boundary to foster an effective planning process that ensures connectivity between modes, reduces access disadvantages experienced by modal systems, and promotes efficient overall transportation investment strategies.

(j) Following MPA boundary approval by the MPO and the Governor, the MPA boundary descriptions shall be provided for informational purposes to the FHWA and the FTA. The MPA boundary descriptions shall be submitted either as a geo-spatial database or described in sufficient detail to enable the boundaries to be accurately delineated on a map.

§ 450.314 Metropolitan planning agreements.

(a) The MPO, the State(s), and the public transportation operator(s) shall cooperatively determine their mutual responsibilities in carrying out the metropolitan transportation planning process. These responsibilities shall be clearly identified in a written agreement among the MPO, the State(s), and the public transportation operator(s) serving the MPA.

(1) The written agreement shall include specific provisions for cooperatively developing and sharing information related to the development of financial plans that support the metropolitan transportation plan (*see* § 450.322) and the metropolitan TIP (*see* § 450.324) and development of the annual listing of obligated projects (*see* § 450.332).

(2) The written agreement should include provisions for consulting with officials responsible for other types of planning affected by transportation, including State and local planned growth, economic development, environmental protection, airport operations, freight movements, safety/security operations, and providers of non-emergency transportation services receiving financial assistance from a source other than title 49, U.S.C., Chapter 53 that may include (as appropriate) transportation planning products or milestones representing consultation opportunities and/or periodic review of the various consultation mechanisms.

(b) If the MPA does not include the entire nonattainment or maintenance area, there shall be a written agreement among the State department of transportation, State air quality agency, affected local agencies, and the MPO describing the process for cooperative planning and analysis of all projects outside the MPA within the nonattainment or maintenance area. The agreement must also indicate how the total transportation-related emissions for the nonattainment or maintenance area, including areas outside the MPA, will be treated for the purposes of determining conformity in accordance with the EPA's transportation conformity rule (40 CFR part 93). The agreement shall address policy mechanisms for resolving conflicts concerning transportation-related emissions that may arise between the MPA and the portion of the nonattainment or maintenance area outside the MPA.

(c) In nonattainment or maintenance areas, if the MPO is not the designated agency for air quality planning under section 174 of the Clean Air Act *(42 U.S.C. 7504),* there shall be a written agreement between the MPO and the desig-

nated air quality planning agency describing their respective roles and responsibilities for air quality related transportation planning.

(d) If more than one MPO has been designated to serve an urbanized area, there shall be a written agreement between the MPOs, the State(s), and the public transportation operator(s) describing how the metropolitan transportation planning processes will be coordinated to assure the development of consistent metropolitan transportation plans and TIPs across the MPA boundaries, particularly in cases in which a proposed transportation investment extends across the boundaries of more than one MPA. If any part of the urbanized area is a nonattainment or maintenance area, the agreement also shall include State and local air quality agencies. The [*33544] metropolitan transportation planning processes for affected MPOs should, to the maximum extent possible, reflect coordinated data collection, analysis, and planning assumptions across the MPAs. Alternatively, a single metropolitan transportation plan and/or TIP for the entire urbanized area may be developed jointly by the MPOs in cooperation with their respective planning partners. Coordination efforts and outcomes shall be documented in subsequent transmittals of the UPWP and other planning products, including the metropolitan transportation plan and TIP, to the State(s), the FHWA, and the FTA.

(e) Where the boundaries of the urbanized area or MPA extend across two or more States, the Governors with responsibility for a portion of the multistate area, the appropriate MPO(s), and the public transportation operator(s) shall coordinate transportation planning for the entire multistate area. States involved in such multistate transportation planning may:

(1) Enter into agreements or compacts, not in conflict with any law of the United States, for cooperative efforts and mutual assistance in support of activities authorized under this section as the activities pertain to interstate areas and localities within the States; and

(2) Establish such agencies, joint or otherwise, as the States may determine desirable for making the agreements and compacts effective.

(f) If part of an urbanized area that has been designated as a TMA overlaps into an adjacent MPA that does not primarily serve a TMA, the entire adjacent urbanized area is not necessarily considered a TMA. However, at a minimum, there shall be a written agreement between the State(s), the MPOs, and the public transportation operator(s) describing how specific TMA requirements (e.g., congestion management process, Surface Transportation Program funds suballocated to the urbanized area over 200,000 population, and project selection) will be met for the overlapping part of the urbanized area contained in the TMA.

§ 450.316 Interested parties, participation, and consultation.

(a) The MPO shall develop and use a documented participation plan that defines a process for providing citizens, affected public agencies, representatives of public transportation employees, freight shippers, providers of freight transportation services, private providers of transportation, representatives of users of public transportation, representatives of users of pedestrian walkways and bicycle transportation facilities, representatives of the disabled, agencies or entities responsible for safety/security operations, providers of non-emergency transportation services receiving financial assistance from a source other than title 49, U.S.C, Chapter 53, and other interested parties with reasonable opportunities to be involved in the metropolitan transportation planning process.

(1) The participation plan shall be developed by the MPO in consultation with all interested parties and shall, at a minimum, describe explicit procedures, strategies, and desired outcomes for:

(i) Providing adequate public notice of public participation activities and time for public review and comment at key decision points, including but not limited to a reasonable opportunity to comment on the proposed metropolitan transportation plan and the TIP;

(ii) Providing timely notice and reasonable access to information about transportation issues and processes;

(iii) Employing visualization techniques to describe metropolitan transportation plans and TIPs;

(iv) Making public information (technical information and meeting notices) available in electronically accessible formats and means, such as the World Wide Web;

(v) Holding any public meetings at convenient and accessible locations and times;

(vi) Demonstrating explicit consideration and response to public input received during the development of the metropolitan transportation plan and the TIP;

(vii) Seeking out and considering the needs of those traditionally underserved by existing transportation systems, such as low-income and minority households, who may face challenges accessing employment and other services;

(viii) Providing an additional opportunity for public comment, if the final metropolitan transportation plan or TIP differs significantly from the version that was initially made available for public comment;

(ix) Coordinating with the statewide transportation planning public involvement and consultation processes under subpart B of this part; and

(x) Periodically reviewing the effectiveness of the procedures and strategies contained in the participation plan to ensure a full and open participation process.

(2) When significant written and oral comments are received on the draft metropolitan transportation plan and TIP (including the financial plans) as a result of the participation process in this section or the interagency consultation process required under the EPA transportation conformity regulations (40 CFR part 93), a summary, analysis, and report on the disposition of comments shall be made as part of the final metropolitan transportation plan and TIP.

(3) A minimum public comment period of 45 calendar days shall be provided before the initial or revised participation plan is adopted by the MPO. Copies of the approved participation plan shall be provided to the FHWA and the FTA for informational purposes and shall be posted on the World Wide Web, to the maximum extent practicable.

(b) In developing metropolitan transportation plans and TIPs, the MPO shall consult, as appropriate, with agencies and officials responsible for other planning activities within the MPA that are affected by transportation. To coordinate the planning functions to the maximum extent practicable, such consultation shall compare metropolitan transportation plans and TIPs, as they are developed, with the plans, maps, inventories, and planning documents developed by other agencies. This consultation shall include, as appropriate, contacts with State, local, Indian Tribal, and private agencies responsible for planned growth, economic development, environmental protection, airport operations, freight movements, land use management, natural resources, conservation, and historic preservation. In addition, transportation plans and TIPs shall be developed with due consideration of other related planning activities within the metropolitan area, and the process shall provide for the design and delivery of transportation services within the area that are provided by:

(1) Recipients of assistance under title 49, U.S.C., Chapter 53;

(2) Governmental agencies and non-profit organizations (including representatives of the agencies and organizations) that receive Federal assistance from a source other than the U.S. Department of Transportation to provide non-emergency transportation services; and

(3) Recipients of assistance under *23 U.S.C. 204.*

(c) When the MPA includes Indian Tribal lands, the MPO shall appropriately involve the Indian Tribal government(s) in the development of the metropolitan transportation plan and the TIP. [*33545]

(d) When the MPA includes Federal public lands, the MPO shall appropriately involve the Federal land management agencies in the development of the metropolitan transportation plan and the TIP.

(e) The MPOs are encouraged to develop a documented process(es) that outlines roles, responsibilities, and key decision points for consulting with other governments and agencies, as defined in paragraphs (b), (c), and (d) of this section, which may be included in the agreement(s) developed under § 450.314.

§ 450.318 Transportation planning studies and project development.

(a) The MPO, State, and/or public transportation operator may undertake a corridor or subarea planning study as part of the metropolitan transportation planning process. The results of these transportation planning studies may be incorporated into the overall project development process to the extent that they meet the requirements of the National Environmental Policy Act (NEPA) of 1969 *(42 U.S.C. 4321 et seq.*) and associated implementing regulations (23 CFR part 771 and 40 CFR parts 1500-1508). Specifically, these corridor or subarea studies may be used to produce any of the following for a proposed transportation project:

(1) Purpose and need or goals and objective statement(s);

(2) General travel corridor and/or general mode(s) definition (*i.e.*, highway, transit, or a highway/transit combination);

(3) Preliminary screening of alternatives and elimination of unreasonable alternatives;

(4) Description of the affected environment; and/or

(5) Preliminary identification of environmental impacts and environmental mitigation.

(b) Publicly available documents produced by, or in support of, the transportation planning process described in this subpart may be incorporated by reference into subsequent NEPA documents, in accordance with *40 CFR 1502.21*, to the extent that:

(1) The NEPA lead agencies agree that such incorporation will aid in establishing or evaluating the purpose and need for the Federal action, reasonable alternatives, cumulative or other impacts on the human and natural environment, or mitigation of these impacts; and

(2) The corridor or subarea planning study is conducted with:

(i) Involvement of interested State, local, Tribal, and Federal agencies;

(ii) Public review;

(iii) Continual opportunity to comment during the metropolitan transportation planning process and development of the corridor or subarea planning study;

(iv) Documentation of relevant decisions in a form that is identifiable and available for review during the NEPA scoping process and can be appended to or referenced in the NEPA document; and

(v) The review of the FHWA and the FTA, as appropriate.

(c) By agreement of the NEPA lead agencies, the above integration may be accomplished through incorporating the subarea or corridor planning study into the draft Environmental Impact Statement or Environmental Assessment and other means of incorporation by reference that the NEPA lead agencies deem appropriate. Additional details on linkages between the transportation planning and project development/NEPA processes is contained in Appendix A to this part.

§ 450.320 Congestion management process in transportation management areas.

(a) The transportation planning process in a TMA shall address congestion management through a process that provides for safe and effective integrated management and operation of the multimodal transportation system, based on a cooperatively developed and implemented metropolitan-wide strategy, of new and existing transportation facilities eligible for funding under title 23, U.S.C., and title 49, U.S.C., Chapter 53 through the use of travel demand reduction and operational management strategies.

(b) The development of a congestion management process should result in multimodal system performance measures and strategies that can be reflected in the metropolitan transportation plan and the TIP. The level of system performance deemed acceptable by State and local transportation officials may vary by type of transportation facility, geographic location (metropolitan area or subarea), and/or time of day. In addition, consideration should be given to strategies that manage demand, reduce single occupant vehicle (SOV) travel, and improve transportation system management and operations. Where the addition of general purpose lanes is determined to be an appropriate congestion management strategy, explicit consideration is to be given to the incorporation of appropriate features into the SOV project to facilitate future demand management strategies and operational improvements that will maintain the functional integrity and safety of those lanes.

(c) The congestion management process shall be developed, established, and implemented as part of the metropolitan transportation planning process that includes coordination with transportation system management and operations activities. The congestion management process shall include:

(1) Methods to monitor and evaluate the performance of the multimodal transportation system, identify the causes of recurring and non-recurring congestion, identify and evaluate alternative strategies, provide information supporting the implementation of actions, and evaluate the effectiveness of implemented actions;

(2) Definition of congestion management objectives and appropriate performance measures to assess the extent of congestion and support the evaluation of the effectiveness of congestion reduction and mobility enhancement strategies for the movement of people and goods. Since levels of acceptable system performance may vary among local communities, performance measures should be tailored to the specific needs of the area and established cooperatively by the State(s), affected MPO(s), and local officials in consultation with the operators of major modes of transportation in the coverage area;

(3) Establishment of a coordinated program for data collection and system performance monitoring to define the extent and duration of congestion, to contribute in determining the causes of congestion, and evaluate the efficiency and effectiveness of implemented actions. To the extent possible, this data collection program should be coordinated with existing data sources (including archived operational/ITS data) and coordinated with operations managers in the metropolitan area;

(4) Identification and evaluation of the anticipated performance and expected benefits of appropriate congestion management strategies that will contribute to the more effective use and improved safety of existing and future transportation systems based on the established performance measures. The following categories of strategies, or combinations of strategies, are some examples of what should be appropriately considered for each area:

(i) Demand management measures, including growth management and congestion pricing;

(ii) Traffic operational improvements; [*33546]

(iii) Public transportation improvements;

(iv) ITS technologies as related to the regional ITS architecture; and

(v) Where necessary, additional system capacity;

(5) Identification of an implementation schedule, implementation responsibilities, and possible funding sources for each strategy (or combination of strategies) proposed for implementation; and

(6) Implementation of a process for periodic assessment of the effectiveness of implemented strategies, in terms of the area's established performance measures. The results of this evaluation shall be provided to decisionmakers and the public to provide guidance on selection of effective strategies for future implementation.

(d) In a TMA designated as nonattainment area for ozone or carbon monoxide pursuant to the Clean Air Act, Federal funds may not be programmed for any project that will result in a significant increase in the carrying capacity for SOVs (i.e., a new general purpose highway on a new location or adding general purpose lanes, with the exception of safety improvements or the elimination of bottlenecks), unless the project is addressed through a congestion management process meeting the requirements of this section.

(e) In nonattainment and maintenance area TMAs, the congestion management process shall provide an appropriate analysis of all reasonable (including multimodal) travel demand reduction and operational management strategies for the corridor in which a project that will result in a significant increase in capacity for SOVs (as described in paragraph (d) of this section) is proposed. If the analysis demonstrates that travel demand reduction and operational management strategies cannot fully satisfy the need for additional capacity in the corridor and additional SOV capacity is warranted, then the congestion management process shall identify all reasonable strategies to manage the SOV facility safely and effectively (or to facilitate its management in the future). Other travel demand reduction and operational management strategies appropriate for the corridor, but not appropriate for incorporation into the SOV facility itself, shall also be identified through the congestion management process. All identified reasonable travel demand reduction and operational management strategies shall be incorporated into the SOV project or committed to by the State and MPO for implementation.

(f) State laws, rules, or regulations pertaining to congestion management systems or programs may constitute the congestion management process, if the FHWA and the FTA find that the State laws, rules, or regulations are consistent with, and fulfill the intent of, the purposes of *23 U.S.C. 134* and *49 U.S.C. 5303*.

§ 450.322 Development and content of the metropolitan transportation plan.

(a) The metropolitan transportation planning process shall include the development of a transportation plan addressing at least a 20-year planning horizon as of the effective date. In nonattainment and maintenance areas, the effective

date of the transportation plan shall be the date of a conformity determination issued by the FHWA and the FTA. In attainment areas, the effective date of the transportation plan shall be its date of adoption by the MPO.

(b) The transportation plan shall include both long-range and short-range strategies/actions that lead to the development of an integrated multimodal transportation system to facilitate the safe and efficient movement of people and goods in addressing current and future transportation demand.

(c) The MPO shall review and update the transportation plan at least every four years in air quality nonattainment and maintenance areas and at least every five years in attainment areas to confirm the transportation plan's validity and consistency with current and forecasted transportation and land use conditions and trends and to extend the forecast period to at least a 20-year planning horizon. In addition, the MPO may revise the transportation plan at any time using the procedures in this section without a requirement to extend the horizon year. The transportation plan (and any revisions) shall be approved by the MPO and submitted for information purposes to the Governor. Copies of any updated or revised transportation plans must be provided to the FHWA and the FTA.

(d) In metropolitan areas that are in nonattainment for ozone or carbon monoxide, the State air quality agency shall coordinate the development of the transportation control measures (TCMs) in a State Implementation Plan (SIP) with the MPO. For TCM substitutions or additions made under section 176(c)(8) of the Clean Air Act *(42 U.S.C. 7506*(c)(8)), the MPO, State air quality agency, and the EPA must concur on the equivalency of any substitute TCMs and the addition of new TCMs to the SIP.

(e) The transportation plan update process shall include a mechanism for ensuring that the MPO, the State(s), and the public transportation operator(s) agree that the data utilized in preparing other existing modal plans providing input to the transportation plan are valid. In updating the transportation plan, the MPO shall base the update on the latest available estimates and assumptions for population, land use, travel, employment, congestion, and economic activity. The MPO shall approve transportation plan contents and supporting analyses produced by a transportation plan update.

(f) The metropolitan transportation plan shall, at a minimum, include:

(1) The projected transportation demand of persons and goods in the metropolitan planning area over the period of the transportation plan;

(2) Existing and proposed transportation facilities (including major roadways, transit, multimodal and intermodal facilities, pedestrian walkways and bicycle facilities, and intermodal connectors) that should function as an integrated metropolitan transportation system, giving emphasis to those facilities that serve important national and regional transportation functions over the period of the transportation plan. In addition, the locally preferred alternative selected from an Alternatives Analysis under the FTA's Capital Investment Grant program *(49 U.S.C. 5309* and 49 CFR part 611) needs to be adopted as part of the metropolitan transportation plan as a condition for funding under *49 U.S.C. 5309;*

(3) Operational and management strategies to improve the performance of existing transportation facilities to relieve vehicular congestion and maximize the safety and mobility of people and goods;

(4) Consideration of the results of the congestion management process in TMAs that meet the requirements of this subpart, including the identification of SOV projects that result from a congestion management process in TMAs that are nonattainment for carbon monoxide or ozone;

(5) Assessment of capital investment and other strategies to preserve the existing and projected future metropolitan transportation infrastructure and provide for multimodal capacity increases based on regional priorities and needs;

(6) Design concept and design scope descriptions of all existing and proposed transportation facilities in sufficient detail, regardless of funding source, in nonattainment and maintenance areas for conformity [*33547] determinations under the EPA's transportation conformity rule (40 CFR part 93). In all areas (regardless of air quality designation), all proposed improvements shall be described in sufficient detail to develop cost estimates;

(7) A discussion of potential environmental mitigation activities and potential areas to carry out these activities, including activities that may have the greatest potential to restore and maintain the environmental functions affected by the metropolitan transportation plan. The discussion shall be developed in consultation with Federal, State, and Tribal land management, wildlife, and regulatory agencies. The MPO may establish reasonable timeframes for performing this consultation;

(8) Pedestrian walkway and bicycle transportation facilities in accordance with *23 U.S.C. 217*(g);

(9) Transportation and transit enhancement activities, as appropriate; and

(10) A financial plan that demonstrates how the adopted transportation plan can be implemented, while operating and maintaining existing facilities and services. For the purpose of developing the transportation plan, the MPO, public transportation operator(s), and State shall cooperatively develop estimates of funds that will be available to support metropolitan transportation plan implementation, as required under § 450.314(a)(1). All necessary financial resources from public and private sources that are reasonably expected to be made available to carry out the transportation plan shall be identified. The financial plan shall include recommendations on any additional financing strategies to fund projects and programs included in the metropolitan transportation plan. In the case of new funding sources, strategies for ensuring their availability shall be identified. In developing the financial plan, the MPO shall take into account all projects and strategies proposed for funding under title *23, U.S.C., title 49,* U.S.C., Chapter 53, or with other Federal funds; State assistance; local sources; and private participation. For nonattainment and maintenance areas, the financial plan shall address the specific financial strategies required to ensure the implementation of TCMs in the applicable SIP. In addition, the financial plan may include, for illustrative purposes, additional projects that would be included in the adopted transportation plan if additional resources beyond those identified in the financial plan were available. Additional criteria and information on financial plans that support metropolitan transportation plans are contained in Appendix B to this part.

(g) The MPO shall consult, as appropriate, with State and local agencies responsible for land use management, natural resources, environmental protection, conservation, and historic preservation concerning the development of the transportation plan. The consultation shall involve, as appropriate:

(1) Comparison of transportation plans with State conservation plans or maps, if available; or

(2) Comparison of transportation plans to inventories of natural or historic resources, if available.

(h) The metropolitan transportation plan should include a safety element that incorporates or summarizes the priorities, goals, countermeasures, or projects for the MPA contained in the Strategic Highway Safety Plan required under *23 U.S.C. 148,* as well as (as appropriate) emergency relief and disaster preparedness plans and strategies and policies that support homeland security and safeguard the personal security of all motorized and non-motorized users.

(i) The MPO shall provide citizens, affected public agencies, representatives of public transportation employees, freight shippers, providers of freight transportation services, private providers of transportation, representatives of users of public transportation, representatives of users of pedestrian walkways and bicycle transportation facilities, representatives of the disabled, and other interested parties with a reasonable opportunity to comment on the transportation plan using the participation plan developed under § 450.316(a).

(j) The metropolitan transportation plan shall be published or otherwise made readily available by the MPO for public review, including (to the maximum extent practicable) in electronically accessible formats and means, such as the World Wide Web.

(k) A State or MPO shall not be required to select any project from the illustrative list of additional projects included in the financial plan under paragraph (f)(9) of this section.

(l) In nonattainment and maintenance areas for transportation-related pollutants, the MPO, as well as the FHWA and the FTA, must make a conformity determination on any updated or amended transportation plan in accordance with the Clean Air Act and the EPA transportation conformity regulations (40 CFR part 93). During a conformity lapse, MPOs can prepare an interim metropolitan transportation plan as a basis for advancing projects that are eligible to proceed under a conformity lapse. An interim metropolitan transportation plan consisting of eligible projects from the most recent conforming transportation plan and TIP may proceed immediately without revisiting the requirements of this section, subject to interagency consultation. An interim metropolitan transportation plan containing eligible projects that are not from the most recent conforming transportation plan and TIP must meet all the requirements of this section.

§ 450.324 Development and content of the transportation improvement program (TIP).

(a) The MPO, in cooperation with the State(s) and any affected public transportation operator(s), shall develop a TIP for the metropolitan planning area. The TIP shall cover a period of not less than four years, be updated at least every four years, and be approved by the MPO and the Governor. If the TIP covers more than four years, the FHWA and the FTA will consider the projects in the additional years as informational. The TIP may be updated more frequently, but the cycle for updating the TIP must be compatible with the STIP development and approval process. The

TIP expires when the FHWA/FTA approval of the STIP expires. Copies of any updated or revised TIPs must be provided to the FHWA and the FTA. In nonattainment and maintenance areas subject to transportation conformity requirements, the FHWA and the FTA, as well as the MPO, must make a conformity determination on any updated or revised TIP, in accordance with the Clean Air Act requirements and the EPA's transportation conformity regulations (40 CFR part 93).

(b) The MPO shall provide all interested parties with a reasonable opportunity to comment on the proposed TIP as required by § 450.316(a). In addition, in nonattainment area TMAs, the MPO shall provide at least one formal public meeting during the TIP development process, which should be addressed through the participation plan described in § 450.316(a). In addition, the TIP shall be published or otherwise made readily available by the MPO for public review, including (to the maximum extent practicable) in electronically accessible formats and means, such as the World Wide Web, as described in § 450.316(a).

(c) The TIP shall include federally supported capital and non-capital surface transportation projects (or phases of projects) within the [*33548] boundaries of the metropolitan planning area proposed for funding under 23 U.S.C. and 49, U.S.C., Chapter 53 (including transportation enhancements; Federal Lands Highway program projects; safety projects included in the State's Strategic Highway Safety Plan; trails projects; pedestrian walkways; and bicycle facilities), but excluding:

(1) Safety projects funded under *49 U.S.C. 31102;*

(2) Metropolitan planning projects funded under *23 U.S.C. 104*(f), *49 U.S.C. 5305*(d), and *49 U.S.C. 5339;*

(3) State planning and research projects funded under *23 U.S.C. 505* and *49 U.S.C. 5305*(e);

(4) At the discretion of the State and MPO, State planning and research projects funded with National Highway System, Surface Transportation Program, and/or Equity Bonus funds;

(5) Emergency relief projects (except those involving substantial functional, locational, or capacity changes);

(6) National planning and research projects funded under *49 U.S.C. 5314;* and

(7) Project management oversight projects funded under *49 U.S.C. 5327.*

(d) The TIP shall contain all regionally significant projects requiring an action by the FHWA or the FTA whether or not the projects are to be funded under title 23, U.S.C., Chapters 1 and 2 or title 49, U.S.C., Chapter 53 (*e.g.*, addition of an interchange to the Interstate System with State, local, and/or private funds and congressionally designated projects not funded under *23 U.S.C. or 49* U.S.C., Chapter 53). For public information and conformity purposes, the TIP should include all regionally significant projects proposed to be funded with Federal funds other than those administered by the FHWA or the FTA, as well as all regionally significant projects to be funded with non-Federal funds.

(e) The TIP shall include, for each project or phase (*e.g.*, preliminary engineering, environment/NEPA, right-of-way, design, or construction), the following:

(1) Sufficient descriptive material (*i.e.*, type of work, termini, and length) to identify the project or phase;

(2) Estimated total project cost, which may extend beyond the four years of the TIP;

(3) The amount of funds proposed to be obligated during each program year for the project or phase (by category and source);

(4) Identification of the agencies responsible for carrying out the project or phase;

(5) In nonattainment and maintenance areas, identification of those projects which are identified as TCMs in the applicable SIP;

(6) In nonattainment and maintenance areas, included projects shall be specified in sufficient detail (design concept and scope) for air quality analysis in accordance with the EPA transportation conformity regulation (40 CFR part 93); and

(7) In areas with Americans with Disabilities Act required paratransit and key station plans, identification of those projects that will implement these plans.

(f) Projects that are not considered to be of appropriate scale for individual identification in a given program year may be grouped by function, work type, and/or geographic area using the applicable classifications under *23 CFR 771.117(c)* and (d) and/or 40 CFR part 93. In nonattainment and maintenance areas, classifications must be consistent with the "exempt project" classifications contained in the EPA transportation conformity regulation (40 CFR part 93). In addition, projects proposed for funding under title 23, U.S.C., Chapter 2 that are not regionally significant may be grouped in one line item or identified individually in the TIP.

(g) Each project or project phase included in the TIP shall be consistent with the approved metropolitan transportation plan.

(h) The TIP shall include a financial plan that demonstrates how the approved TIP can be implemented, indicates resources from public and private sources that are reasonably expected to be made available to carry out the TIP, and recommends any additional financing strategies for needed projects and programs. In developing the TIP, the MPO, State(s), and public transportation operator(s) shall cooperatively develop estimates of funds that are reasonably expected to be available to support TIP implementation, in accordance with § 450.314(a)(1). Only projects for which construction or operating funds can reasonably be expected to be available may be included. In the case of new funding sources, strategies for ensuring their availability shall be identified. In developing the financial plan, the MPO shall take into account all projects and strategies funded under title *23, U.S.C., title 49,* U.S.C., Chapter 53, and other Federal funds; regionally significant projects that are not Federally funded; and operation and maintenance of the existing system. The financial plan may include, for illustrative purposes, additional projects that would be included in the adopted transportation plan and TIP if reasonable additional resources beyond those identified in the financial plan were available. Additional criteria and information on financial plans that support the TIP are contained in Appendix B to this part.

(i) The TIP shall include a project, or a phase of a project, only if full funding can reasonably be anticipated to be available for the project within the time period contemplated for completion of the project. In nonattainment and maintenance areas, projects included in the first two years of the TIP shall be limited to those for which funds are available or committed. The TIP financial constraint shall be demonstrated and maintained by year and shall include sufficient financial information to demonstrate which projects are to be implemented using current and/or reasonably available revenues, by source, and which projects are to be implemented using proposed revenue sources while the entire transportation system is being adequately operated and maintained. In the case of proposed funding sources, strategies for ensuring their availability shall be identified in the financial plan consistent with paragraph (h) of this section. Additional information on TIP financial constraint and the financial plan that supports the TIP are contained in appendix B of this part. In nonattainment and maintenance areas, the TIP shall give priority to eligible TCMs identified in the approved SIP in accordance with the EPA transportation conformity regulation (40 CFR part 93) and shall provide for their timely implementation.

(j) As a management tool for monitoring progress in implementing the transportation plan, the TIP should:

(1) Identify the criteria and process for prioritizing implementation of transportation plan elements (including multimodal trade-offs) for inclusion in the TIP and any changes in priorities from previous TIPs;

(2) List major projects from the previous TIP that were implemented and identify any significant delays in the planned implementation of major projects; and

(3) In nonattainment and maintenance areas, describe the progress in implementing any required TCMs, in accordance with 40 CFR part 93.

(k) During a conformity lapse, MPOs may prepare an interim TIP as a basis for advancing projects that are eligible to proceed under a lapse (as defined in 40 CFR part 93). An interim TIP consisting of eligible projects from the most recent conforming metropolitan transportation plan and TIP may [*33549] proceed immediately without revisiting the requirements of this section, subject to interagency consultation defined in 40 CFR part 93. An interim TIP containing eligible projects that are not from the most recent conforming transportation plan and TIP must meet all the requirements of this section.

(l) Projects in any of the first four years of the TIP may be advanced in place of another project in the first four years of the TIP, subject to the project selection requirements of § 450.330. In addition, the TIP may be revised at any time under procedures agreed to by the State, MPO(s), and public transportation operator(s) consistent with the TIP development procedures established in this section, as well as the procedures for the MPO participation plan (see § 450.316(a)) and FHWA/FTA actions on the TIP (see § 450.328).

§ 450.326 TIP revisions and relationship to the STIP.

(a) An MPO may revise the TIP at any time under procedures agreed to by the cooperating parties consistent with the procedures established in this part for its development and approval. In nonattainment or maintenance areas for transportation-related pollutants, if the TIP is amended by adding or deleting non-exempt projects (per 40 CFR part 93), or is replaced with an updated TIP, the MPO and the FHWA and the FTA must make a new conformity determination. In all areas, changes that affect fiscal constraint must take place by amendment of the TIP. Public participation procedures consistent with § 450.316(b) shall be utilized in revising the TIP, except that these procedures are not required for administrative modifications that only involve projects of the type covered in § 450.324(f).

(b) After approval by the MPO and the Governor, the TIP shall be included without change, directly or by reference, in the STIP required under *23 U.S.C. 135.* In nonattainment and maintenance areas, a conformity finding on the TIP must be made by the FHWA and the FTA before it is included in the STIP. A copy of the approved TIP shall be provided to the FHWA and the FTA.

(c) The State shall notify the MPO and Federal land management agencies when a TIP including projects under the jurisdiction of these agencies has been included in the STIP.

§ 450.328 TIP action by the FHWA and the FTA.

(a) The FHWA and the FTA shall jointly find that each metropolitan TIP, including amendments thereto, is consistent with the metropolitan transportation plan produced by the continuing, comprehensive transportation process carried on cooperatively by the MPO(s), the State(s), and the public transportation operator(s) in accordance with *23 U.S.C. 134* and *49 U.S.C. 5303.* This finding shall be based on the self-certification statement submitted by the State and MPO under § 450.334, a review of the metropolitan transportation plan by the FHWA and the FTA, and upon other reviews as deemed necessary by the FHWA and the FTA.

(b) In nonattainment and maintenance areas, the MPO, as well as the FHWA and the FTA, shall determine conformity of any updated or amended TIP, in accordance with 40 CFR part 93. After the FHWA and the FTA issue a conformity determination on the TIP, the TIP shall be incorporated, without change, into the STIP, directly or by reference.

(c) If the metropolitan transportation plan has not been updated in accordance with the cycles defined in § 450.322(c), projects may only be advanced from a previously approved TIP in attainment areas or a previously conforming TIP in nonattainment and maintenance areas. Until the MPO approves (in attainment areas) or the FHWA/FTA issues a conformity determination on (in nonattainment and maintenance areas) the updated metropolitan transportation plan, the TIP may not be amended.

(d) In the case of extenuating circumstances, the FHWA and the FTA will consider and take appropriate action on requests to extend the STIP approval period for all or part of the TIP in accordance with § 450.216(e).

(e) If an illustrative project is included in the TIP, no Federal action may be taken on that project by the FHWA and the FTA until it is formally included in the financially constrained and conforming metropolitan transportation plan and TIP.

(f) Where necessary in order to maintain or establish operations, the FHWA and/or the FTA may approve transit operating assistance for specific projects or programs funded under *49 U.S.C. 5307*, 5311, 5316, and 5317, even though the projects or programs may not be included in an approved TIP/STIP.

§ 450.330 Project selection from the TIP.

(a) Once a TIP that meets the requirements of *23 U.S.C. 134*(j), *49 U.S.C. 5303*(j), and § 450.324 has been developed and approved, the first year of the TIP shall constitute an "agreed to" list of projects for project selection purposes and no further project selection action is required for the implementing agency to proceed with projects, except where the appropriated Federal funds available to the metropolitan planning area are significantly less than the authorized amounts or where there are significant shifting of projects between years. In this case, a revised "agreed to" list of projects shall be jointly developed by the MPO, the State, and the public transportation operator(s) if requested by the MPO, the State, or the public transportation operator(s). If the State or public transportation operator(s) wishes to proceed with a project in the second, third, or fourth year of the TIP, the specific project selection procedures stated in paragraphs (b) and (c) of this section must be used unless the MPO, the State, and the public transportation operator(s)

jointly develop expedited project selection procedures to provide for the advancement of projects from the second, third, or fourth years of the TIP.

(b) In metropolitan areas not designated as TMAs, projects to be implemented using title 23, U.S.C. funds (other than Federal Lands Highway program projects) or funds under title 49, U.S.C., Chapter 53, shall be selected by the State and/or the public transportation operator(s), in cooperation with the MPO from the approved metropolitan TIP. Federal Lands Highway program projects shall be selected in accordance with procedures developed pursuant to *23 U.S.C. 204.*

(c) In areas designated as TMAs, all 23 U.S.C. and 49 U.S.C., Chapter 53 funded projects (excluding projects on the National Highway System (NHS) and projects funded under the Bridge, Interstate Maintenance, and Federal Lands Highway programs) shall be selected by the MPO in consultation with the State and public transportation operator(s) from the approved TIP and in accordance with the priorities in the approved TIP. Projects on the NHS and projects funded under the Bridge and Interstate Maintenance programs shall be selected by the State in cooperation with the MPO, from the approved TIP. Federal Lands Highway program projects shall be selected in accordance with procedures developed pursuant to *23 U.S.C. 204.*

(d) Except as provided in § 450.324(c) and § 450.328(f), projects not included in the federally approved STIP shall not be eligible for funding with funds under title *23, U.S.C., or 49* U.S.C., Chapter 53.

(e) In nonattainment and maintenance areas, priority shall be given to the timely implementation of TCMs contained in the applicable SIP in accordance with the EPA transportation conformity regulations (40 CFR part 93). [*33550]

§ 450.332 Annual listing of obligated projects.

(a) In metropolitan planning areas, on an annual basis, no later than 90 calendar days following the end of the State program year, the State, public transportation operator(s), and the MPO shall cooperatively develop a listing of projects (including investments in pedestrian walkways and bicycle transportation facilities) for which funds under *23 U.S.C. or 49* U.S.C., Chapter 53 were obligated in the preceding program year.

(b) The listing shall be prepared in accordance with § 450.314(a)(1) and shall include all federally funded projects authorized or revised to increase obligations in the preceding program year, and shall at a minimum include the TIP information under § 450.324(e)(1) and (4) and identify, for each project, the amount of Federal funds requested in the TIP, the Federal funding that was obligated during the preceding year, and the Federal funding remaining and available for subsequent years.

(c) The listing shall be published or otherwise made available in accordance with the MPO's public participation criteria for the TIP.

§ 450.334 Self-certifications and Federal certifications.

(a) For all MPAs, concurrent with the submittal of the entire proposed TIP to the FHWA and the FTA as part of the STIP approval, the State and the MPO shall certify at least every four years that the metropolitan transportation planning process is being carried out in accordance with all applicable requirements including:

(1) *23 U.S.C. 134, 49 U.S.C. 5303,* and this subpart;

(2) In nonattainment and maintenance areas, sections 174 and 176 (c) and (d) of the Clean Air Act, as amended *(42 U.S.C. 7504,* 7506 (c) and (d)) and 40 CFR part 93;

(3) Title VI of the Civil Rights Act of 1964, as amended *(42 U.S.C. 2000d-1),* 49 CFR part 21, and 23 CFR part 230;

(4) Section 1101(b) of the SAFETEA-LU (Pub. L. 109-59) and 49 CFR part 26 regarding the involvement of disadvantaged business enterprises in USDOT funded projects;

(5) The provisions of the Americans with Disabilities Act of 1990 *(42 U.S.C. 12101 et seq.*) and 49 CFR parts 27, 37, and 38;

(6) The Older Americans Act, as amended *(42 U.S.C. 6101),* prohibiting discrimination on the basis of age in programs or activities receiving Federal financial assistance;

(7) *Section 324 of title 23, U.S.C.*, regarding the prohibition of discrimination based on gender; and

(8) Section 504 of the Rehabilitation Act of 1973 *(29 U.S.C. 794)* and 49 CFR part 35 regarding discrimination against individuals with disabilities.

(b) In TMAs, the FHWA and the FTA jointly shall review and evaluate the transportation planning process for each TMA no less than once every four years to determine if the process meets the requirements of applicable provisions of Federal law and this subpart.

(1) After review and evaluation of the TMA planning process, the FHWA and FTA shall take one of the following actions:

(i) If the process meets the requirements of this part and a TIP has been approved by the MPO and the Governor, jointly certify the transportation planning process;

(ii) If the process substantially meets the requirements of this part and a TIP has been approved by the MPO and the Governor, jointly certify the transportation planning process subject to certain specified corrective actions being taken; or

(iii) If the process does not meet the requirements of this part, jointly certify the planning process as the basis for approval of only those categories of programs or projects that the FHWA and the FTA jointly determine, subject to certain specified corrective actions being taken.

(2) If, upon the review and evaluation conducted under paragraph (b)(1)(iii) of this section, the FHWA and the FTA do not certify the transportation planning process in a TMA, the Secretary may withhold up to 20 percent of the funds attributable to the metropolitan planning area of the MPO for projects funded under title 23, U.S.C., and title 49, U.S.C., Chapter 53, in addition to corrective actions and funding restrictions. The withheld funds shall be restored to the MPA when the metropolitan transportation planning process is certified by the FHWA and FTA, unless the funds have lapsed.

(3) A certification of the TMA planning process will remain in effect for four years unless a new certification determination is made sooner by the FHWA and the FTA or a shorter term is specified in the certification report.

(4) In conducting a certification review, the FHWA and the FTA shall provide opportunities for public involvement within the metropolitan planning area under review. The FHWA and the FTA shall consider the public input received in arriving at a decision on a certification action.

(5) The MPO(s), the State(s), and public transportation operator(s) shall be notified of the actions taken under paragraphs (b)(1) and (b)(2) of this section. The FHWA and the FTA will update the certification status of the TMA when evidence of satisfactory completion of a corrective action(s) is provided to the FHWA and the FTA.

§ 450.336 Applicability of NEPA to metropolitan transportation plans and programs.

Any decision by the FHWA and the FTA concerning a metropolitan transportation plan or TIP developed through the processes provided for in *23 U.S.C. 134* and *49 U.S.C. 5303* shall not be considered to be a Federal action subject to review under NEPA.

§ 450.338 Phase-in of new requirements.

(a) Prior to July 1, 2007, metropolitan transportation plans and TIPs under development since August 10, 2005, may be completed under TEA-21 requirements. Metropolitan transportation plans and TIPs may also reflect the provisions of this part prior to July 1, 2007, but cannot take advantage of the extended update cycles (*e.g.*, four years for TIPs and four years for metropolitan transportation plans in nonattainment and maintenance areas) until all provisions and requirements of this part are reflected in the metropolitan transportation plan and TIP.

(b) For metropolitan transportation plans and TIPs that are developed under TEA-21 requirements prior to July 1, 2007, the FHWA/FTA action (*i.e.*, conformity determinations and STIP approvals) must be completed no later than June 30, 2007. For metropolitan transportation plans in attainment areas that are developed under TEA-21 requirements prior to July 1, 2007, the MPO adoption action must be completed no later than June 30, 2007. If these actions are completed on or after July 1, 2007, the provisions and requirements of this part shall take effect, regardless of when the metropolitan transportation plan or TIP were developed.

(c) In addition, the applicable action (see paragraph (b) of this section) on any amendments or updates to metropolitan transportation plans and TIPs on or after July 1, 2007, shall address the provisions and requirements of this part.

(d) For new TMAs, the congestion management process described in § 450.320 shall be implemented within 18 months of the designation of a new TMA. [*33551]

Appendix A to Part 450--Linking the Transportation Planning and NEPA Processes

Background and Overview

For 40 years, the Congress has directed that federally-funded highway and transit projects must flow from metropolitan and statewide transportation planning processes (pursuant to *23 U.S.C. 134*-135 and *49 U.S.C. 5303*-5306). Over the years, the Congress has refined and strengthened the transportation planning process as the foundation for project decisions, emphasizing public involvement, consideration of environment and other factors, and a Federal role that oversees the transportation planning process but does not second-guess the content of transportation plans and programs.

Despite this statutory emphasis on transportation planning, the environmental analyses produced to meet the requirements of the National Environmental Policy Act (NEPA) of 1969 *(42 U.S.C. 4231 et seq.*) have often been conducted *de novo,* disconnected from the analyses used to develop long-range transportation plans, statewide and metropolitan Transportation Improvement Programs (STIPs/TIPs), planning-level corridor/subarea/feasibility studies, or FTA's planning Alternatives Analyses. When the NEPA and transportation planning processes are not well coordinated, the NEPA process may lead to the development of information that is more appropriately developed in the planning process, resulting in duplication of work and delays in transportation improvements.

The purpose of this Appendix is to change this culture, by supporting congressional intent that statewide and metropolitan transportation planning should be the foundation for highway and transit project decisions. This Appendix was crafted to recognize that transportation planning processes vary across the country. This document provides details on how information, analysis, and products from transportation planning can be incorporated into and relied upon in NEPA documents under existing laws, regardless of when the Notice of Intent has been published. This Appendix presents environmental review as a continuum of sequential study, refinement, and expansion performed in transportation planning and during project development/NEPA, with information developed and conclusions drawn in early stages utilized in subsequent (and more detailed) review stages.

The information below is intended for use by State departments of transportation (State DOTs), metropolitan planning organizations (MPOs), and public transportation operators to clarify the circumstances under which transportation planning level choices and analyses can be adopted or incorporated into the process required by NEPA. Additionally, the FHWA and the FTA will work with Federal environmental, regulatory, and resource agencies to incorporate the principles of this Appendix in their day-to-day NEPA policies and procedures related to their involvement in highway and transit projects.

This Appendix does not extend NEPA requirements to transportation plans and programs. The Transportation Efficiency Act for the 21st Century (TEA-21) and the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) specifically exempted transportation plans and programs from NEPA review. Therefore, initiating the NEPA process as part of, or concurrently with, a transportation planning study does not subject transportation plans and programs to NEPA.

Implementation of this Appendix by States, MPOs, and public transportation operators is voluntary. The degree to which studies, analyses, or conclusions from the transportation planning process can be incorporated into the project development/NEPA processes will depend upon how well they meet certain standards established by NEPA regulations and guidance. While some transportation planning processes already meet these standards, others will need some modification.

The remainder of this Appendix document utilizes a "Question and Answer" format, organized into three primary categories ("Procedural," "Substantive," and "Administrative Issues").

I. Procedural

1. In what format should the transportation planning information be included?

To be included in the NEPA process, work from the transportation planning process must be documented in a form that can be appended to the NEPA document or incorporated by reference. Documents may be incorporated by reference if they are readily available so as to not impede agency or public review of the action. Any document incorporated by reference must be "reasonably available for inspection by potentially interested persons within the time allowed for comment." Incorporated materials must be cited in the NEPA document and their contents briefly described, so that the reader understands why the document is cited and knows where to look for further information. To the extent possible, the documentation should be in a form such as official actions by the MPO and/or correspondence within and among the organizations involved in the transportation planning process.

2. What is a reasonable level of detail for a planning product that is intended to be used in a NEPA document? How does this level of detail compare to what is considered a full NEPA analysis?

For purposes of transportation planning alone, a planning-level analysis does not need to rise to the level of detail required in the NEPA process. Rather, it needs to be accurate and up-to-date, and should adequately support recommended improvements in the statewide or metropolitan long-range transportation plan. The SAFETEA-LU requires transportation planning processes to focus on setting a context and following acceptable procedures. For example, the SAFETEA-LU requires a "discussion of the types of potential environmental mitigation activities" and potential areas for their implementation, rather than details on specific strategies. The SAFETEA-LU also emphasizes consultation with Federal, State, and Tribal land management, wildlife, and regulatory agencies.

However, the Environmental Assessment (EA) or Environmental Impact Statement (EIS) ultimately will be judged by the standards applicable under the NEPA regulations and guidance from the Council on Environmental Quality (CEQ). To the extent the information incorporated from the transportation planning process, standing alone, does not contain all of the information or analysis required by NEPA, then it will need to be supplemented by other information contained in the EIS or EA that would, in conjunction with the information from the plan, collectively meet the requirements of NEPA. The intent is not to require NEPA studies in the transportation planning process. As an option, the NEPA analyses prepared for project development can be integrated with transportation planning studies (see the response to Question 9 for additional information).

3. What type and extent of involvement from Federal, Tribal, State, and local environmental, regulatory, and resource agencies is needed in the transportation planning process in order for planning-level decisions to be more readily accepted in the NEPA process?

Sections 3005, 3006, and 6001 of the SAFETEA-LU established formal consultation requirements for MPOs and State DOTs to employ with environmental, regulatory, and resource agencies in the development of long-range transportation plans. For example, metropolitan transportation plans now "shall include a discussion of the types of potential environmental mitigation activities and potential areas to carry out these activities, including activities that may have the greatest potential to restore and maintain the environmental functions affected by the [transportation] plan," and that these planning-level discussions "shall be developed in consultation with Federal, State, and Tribal land management, wildlife, and regulatory agencies." In addition, MPOs "shall consult, as appropriate, with State and local agencies responsible for land use management, natural resources, environmental protection, conservation, and historic preservation concerning the development of a long-range transportation plan," and that this consultation "shall involve, as appropriate, comparison of transportation plans with State conservation plans or maps, if available, or comparison of transportation plans to inventories of natural or historic resources, if available." Similar SAFETEA-LU language addresses the development of the long-range statewide transportation plan, with the addition of Tribal conservation plans or maps to this planning-level "comparison."

In addition, section 6002 of the SAFETEA-LU established several mechanisms for increased efficiency in environmental reviews for project decision-making. For example, the term "lead agency" means the U. S. Department of Transportation and, if applicable, any State or local government entity serving as a joint lead agency for the [*33552] NEPA process. In addition, the lead agency is responsible for inviting and designating "participating agencies" (***i.e.,*** other Federal or non-Federal agencies that may have an interest in the proposed project). Any Federal agency that is invited by the lead agency to participate in the environmental review process for a project shall be designated as a participating agency by the lead agency unless the invited agency informs the lead agency, in writing, by the deadline specified in the invitation that the invited agency: (a) Has no jurisdiction or authority with respect to the project; (b) has no expertise or information relevant to the project; and (c) does not intend to submit comments on the project.

Past successful examples of using transportation planning products in NEPA analysis are based on early and continuous involvement of environmental, regulatory, and resource agencies. Without this early coordination, environmental, regulatory, and resource agencies are more likely to expect decisions made or analyses conducted in the transportation planning process to be revisited during the NEPA process. Early participation in transportation planning provides environmental, regulatory, and resource agencies better insight into the needs and objectives of the locality. Additionally, early participation provides an important opportunity for environmental, regulatory, and resource agency concerns to be identified and addressed early in the process, such as those related to permit applications. Moreover, Federal, Tribal, and State, and local environmental, regulatory, and resource agencies are able to share data on particular resources, which can play a critical role in determining the feasibility of a transportation solution with respect to environmental impacts. The use of other agency planning outputs can result in a transportation project that could support multiple goals (transportation, environmental, and community). Further, planning decisions by these other agencies may have impacts on long-range transportation plans and/or the STIP/TIP, thereby providing important input to the transportation planning process and advancing integrated decision-making.

Transportation planning products can provide watershed and landscape-level approaches to mitigation that address indirect and cumulative impacts, which must be considered under NEPA. Such broad scale approaches focus on the natural resources within a particular ecosystem or watershed and look at the most critical or high quality resources, rather than focusing narrowly on mitigating at the direct location of impact. Techniques have been developed to better avoid, minimize, and mitigate these impacts, as well as the impacts of past infrastructure projects, on a project-specific basis. However, the avoidance, minimization, and mitigation efforts used may not always provide the greatest environmental benefit, or may do very little to promote ecosystem sustainability. To address concern, the FHWA and seven other Federal agencies produced *Eco-Logical: An Ecosystem Approach to Developing Infrastructure Projects.* (See *http://environment.fhwa.dot.gov/ecological/ecological.pdf.*) Eco-Logical encourages Federal, State, tribal and local partners involved in infrastructure planning, design, review, and construction to use flexibility in regulatory processes. Employing available planning resources such as each State's Comprehensive Wildlife Conservation Strategy, *Eco-Logical* puts forth the conceptual groundwork for integrating plans across agency boundaries, and endorses ecosystem-based mitigation--an innovative method of mitigating infrastructure impacts that cannot be avoided.

The FHWA has emphasized that wetland and natural habitat mitigation measures, such as wetland and habitat banks or statewide and regional conservation measures, are eligible for Federal-aid participation when they are undertaken to create mitigation resources for future transportation projects. In its March 10, 2005, memorandum on Wetland and Natural Habitat Mitigation, the FHWA clarified that, to provide for wetland or other mitigation banks, the State DOT and the FHWA Division Office should identify potential future wetlands and habitat mitigation needs for a reasonable time frame and establish a need for the mitigation credits. The transportation planning process should guide the determination of future mitigation needs." (*See http://www.fhwa.dot.gov/environment/wetland/wethabmitmem.htm.*)

4. What is the procedure for using decisions or analyses from the transportation planning process?

The FHWA and the FTA, as the lead Federal agencies, will have the final say on what processes and consultation techniques are used to determine the transportation planning products that will be incorporated into the NEPA process. At a minimum, a robust scoping/early coordination process (which explains to Federal and State environmental, regulatory, and resource agencies and the public the information and/or analyses utilized to develop the planning products, how the purpose and need was developed and refined, and how the design concept and scope were determined) should play a critical role in leading to informed FHWA/FTA decisions on the suitability of the transportation planning information, analyses, documents, and decisions for use in the NEPA process. As part of a rigorous scoping/early coordination process, the FHWA and the FTA should ensure that the transportation planning results are appropriately documented, shared, and used.

5. To what extent can the FHWA/FTA provide up-front assurance that decisions and additional investments made in the transportation planning process will allow planning-level decisions and analyses to be used in the NEPA process?

There are no guarantees. However, the potential is greatly improved for transportation planning processes that address the "3-C" planning principles (comprehensive, cooperative, and continuous); incorporate the intent of NEPA through the consideration of natural, physical, and social effects; involve environmental, regulatory, and resource agencies; thoroughly document the transportation planning process information, analysis, and decision; and vet the planning results through the applicable public involvement processes.

6. What considerations will the FHWA/FTA take into account in their review of transportation planning products for acceptance in project development/NEPA?

The FHWA and the FTA will give deference to decisions resulting from the transportation planning process if the FHWA and FTA determine that the planning process is consistent with the "3-C" planning principles and when the planning study process, alternatives considered, and resulting decisions have a rational basis that is thoroughly documented and vetted through the applicable public involvement processes. Moreover, any applicable program-specific requirements (*e.g.*, the Congestion Mitigation and Air Quality Improvement Program or the FTA's Capital Investment Grant program) also must be met.

The NEPA requires that the FHWA and the FTA be able to stand behind the overall soundness and credibility of analyses conducted and decisions made during the transportation planning process if they are incorporated into a NEPA document. For example, if systems-level or other broad objectives or choices from the transportation plan are incorporated into the purpose and need statement for a NEPA document, the FHWA and the FTA should not revisit whether these are the best objectives or choices among other options. Rather, the FHWA and the FTA review would include making sure that objectives or choices derived from the transportation plan were: Based on transportation planning factors established by Federal law; reflect a credible and articulated planning rationale; founded on reliable data; and developed through transportation planning processes meeting FHWA and FTA statutory and regulatory requirements. In addition, the basis for the goals and choices must be documented and included in the NEPA document. The FHWA/FTA reviewers do not need to review whether assumptions or analytical methods used in the studies are the best available, but, instead, need to assure that such assumptions or analytical methods are reasonable, scientifically acceptable, and consistent with goals, objectives, and policies set forth in long-range transportation plans. This review would include determining whether: (a) Assumptions have a rational basis and are up-to-date and (b) data, analytical methods, and modeling techniques are reliable, defensible, reasonably current, and meet data quality requirements.

II. Substantive

General Issues To Be Considered

7. What should be considered in order to rely upon transportation planning studies in NEPA?

The following questions should be answered prior to accepting studies conducted during the transportation planning process for use in NEPA. While not a "checklist," these questions are intended to [*33553] guide the practitioner's analysis of the planning products:

. How much time has passed since the planning studies and corresponding decisions were made?

. Were the future year policy assumptions used in the NEPA study related to land use, economic development, transportation costs, and network expansion consistent with those developed and used in the transportation planning process?

. Is the information still relevant/valid?

. What changes have occurred in the area since the study was completed?

. Is the information in a format that can be appended to an environmental document or reformatted to do so?

. Are the analyses in a planning-level report or document based on data, analytical methods, and modeling techniques that are reliable, defensible, and consistent with that used in other regional transportation studies and project development activities?

. Were the FHWA and FTA, other agencies, and the public involved in the relevant planning analysis and the corresponding planning decisions?

. Were the planning products available to other agencies at NEPA scoping?

. At NEPA scoping, was a clear connection between the decisions made in planning and those to be made during the project development stage explained to the public and others? What was the response?

. Are natural resource and land use plans being informed by transportation planning products, and vice versa?

Purpose and Need

8. How can transportation planning be used to shape a project's purpose and need in the NEPA process?

A sound transportation planning process is the primary source of the project purpose and need. Through transportation planning, State and local governments, with involvement of stakeholders and the public, establish a vision for the region's future transportation system, define transportation goals and objectives for realizing that vision, decide which needs to address, and determine the timeframe for addressing these issues. The transportation planning process also provides a potential forum to define a project's purpose and need by framing the scope of the problem to be addressed by a proposed project. This scope may be further refined during the transportation planning process as more information about the transportation need is collected and consultation with the public and other stakeholders clarifies other issues and goals for the region.

Section 6002 of the SAFETEA-LU also provided additional focus regarding the definition of the purpose and need and objectives. For example, the lead agency, as early as practicable during the environmental review process, shall provide an opportunity for involvement by participating agencies and the public in defining the purpose and need for a project. The statement of purpose and need shall include a clear statement of the objectives that the proposed action is intended to achieve, which may include: (a) Achieving a transportation objective identified in an applicable statewide or metropolitan transportation plan; (b) supporting land use, economic development, or growth objectives established in applicable Federal, State, local, or Tribal plans; and (c) serving national defense, national security, or other national objectives, as established in Federal laws, plans, or policies.

The transportation planning process can be utilized to develop the purpose and need in the following ways:

(a) Goals and objectives from the transportation planning process may be part of the project's purpose and need statement;

(b) A general travel corridor or general mode or modes (i.e., highway, transit, or a highway/transit combination) resulting from planning analyses may be part of the project's purpose and need statement;

(c) If the financial plan for a metropolitan transportation plan indicates that funding for a specific project will require special funding sources (e.g., tolls or public-private financing), such information may be included in the purpose and need statement; or

(d) The results of analyses from management systems (e.g., congestion, pavement, bridge, and/or safety) may shape the purpose and need statement.

The use of these planning-level goals and choices must be appropriately explained in the NEPA document.

Consistent with NEPA, the purpose and need statement should be a statement of a transportation problem, not a specific solution. However, the purpose and need statement should be specific enough to generate alternatives that may potentially yield real solutions to the problem at-hand. A purpose and need statement that yields only one alternative may indicate a purpose and need that is too narrowly defined.

Short of a fully integrated transportation decisionmaking process, many State DOTs develop information for their purpose and need statements when implementing interagency NEPA/Section 404 process merger agreements. These agreements may need to be expanded to include commitments to share and utilize transportation planning products when developing a project's purpose and need.

9. Under what conditions can the NEPA process be initiated in conjunction with transportation planning studies?

The NEPA process may be initiated in conjunction with transportation planning studies in a number of ways. A common method is the "tiered EIS," in which general travel corridors, modes, and/or packages of projects are evaluated at a planning level of detail, leading to the refinement of purpose and need and, ideally, selection of the design concept and scope for a subsequent project or series of projects. The tiered EIS uses the NEPA process as a tool to involve environmental, regulatory, and resource agencies and the public in these decisions, as well as to ensure the appropriate consideration of environmental factors in these planning-level decisions.

Corridor or subarea analyses/studies are another option when the long-range transportation plan leaves open the possibility of multiple approaches to fulfill its goals and objectives. In such cases, the formal NEPA process could be initiated through publication of a NOI in conjunction with a corridor or subarea study. Similarly, some public transpor-

tation operators developing major capital projects perform the planning Alternatives Analysis required for funding under FTA's Capital Investment Grant program found in *49 U.S.C. 5309*(d) and (e) within the NEPA process and combine the planning Alternatives Analysis with the draft NEPA document.

Alternatives

10. In the context of this Appendix, what is the meaning of the term "alternatives?"

This Appendix uses the term "alternatives" as specified in the NEPA regulations (*40 CFR 1502.14*), where it is defined in its broadest sense to include everything from major modal alternatives and location alternatives to minor design changes that would mitigate adverse impacts. This Appendix does not use the term as it is used in many other contexts (*e.g.*, "prudent and feasible alternatives" under Section 4(f) of the Department of Transportation Act, the "Least Environmentally Damaging Practicable Alternative" under the Clean Water Act, or the planning Alternatives Analysis in *49 U.S.C. 5309*(d) and (e)).

However, as early as possible in the transportation planning stage of any project, a determination should be made as to whether the alternatives to be considered will need to be used to satisfy multiple statutory and regulatory requirements that will be addressed during the subsequent project development process as an integral part of the NEPA process. If so, during transportation planning, the alternatives chosen for consideration and the analysis of those alternatives should reflect the multiple objectives that must be addressed. For example, if a potential project would require a Section 404 permit, ideally there would be coordination with the U. S. Army Corps of Engineers (COE) and some level of agreement from the COE that the alternatives considered are broad enough to allow for the ultimate development of a Least Environmentally Damaging Practicable Alternative. In this case, screening of alternatives for the presence of important wetlands based on geographic information systems (GIS) or other planning-level data sources would be appropriate to support this early determination.

11. Under what circumstances can alternatives be eliminated from detailed consideration during the NEPA process based on information and analysis from the transportation planning process?

There are two ways in which the transportation planning process can begin limiting the alternative solutions to be evaluated during the NEPA process: (a) Shaping the purpose and need for the project; or (b) evaluating alternatives during planning studies and eliminating some of the alternatives from detailed study in the NEPA process prior to the start of the project-level NEPA process. Each approach requires careful attention, and is summarized below.

(a) *Shaping the Purpose and Need for the Project:* The transportation planning process [*33554] should shape the purpose and need and, thereby, the range of reasonable alternatives. With proper documentation and public involvement, a purpose and need derived from the planning process can legitimately narrow the alternatives analyzed in the NEPA process. See the response to Question 8 for further discussion on how the planning process can shape the purpose and need used in the NEPA process.

For example, the purpose and need may be shaped by the transportation planning process in a manner that consequently narrows the range of alternatives that must be considered in detail in the NEPA document when:

(1) The transportation planning process has selected a *general travel* corridor as best addressing identified transportation problems and the rationale for the determination in the planning document is reflected in the purpose and need statement of the subsequent NEPA document;

(2) The transportation planning process has selected a *general mode* (*i.e.*, highway, transit, or a highway/transit combination) that accomplishes its goals and objectives, and these documented determinations are reflected in the purpose and need statement of the subsequent NEPA document; or

(3) The transportation planning process determines that the project needs to be funded by *tolls or other non-traditional funding sources* in order for the long-range transportation plan to be fiscally constrained or identifies goals and objectives that can only be met by toll roads or other non-traditional funding sources, and that determination of those goals and objectives is reflected in the purpose and need statement of the subsequent NEPA document.

(b) *Evaluating and Eliminating Alternatives During the Transportation Planning Process:* The evaluation and elimination of alternatives during the transportation planning process can be incorporated by reference into a NEPA document under certain circumstances. In these cases, the planning study becomes part of the NEPA process and provides a basis for screening out alternatives. As with any part of the NEPA process, the analysis of alternatives to be in-

corporated from the process must have a rational basis that has been thoroughly documented (including documentation of the necessary and appropriate vetting through the applicable public involvement processes). This record should be made available for public review during the NEPA scoping process.

See responses to Questions 4, 5, 6, and 7 for additional elements to consider with respect to acceptance of planning products for NEPA documentation and the response to Question 12 on the information or analysis from the transportation planning process necessary for supporting the elimination of an alternative(s) from detailed consideration in the NEPA process.

For instance, under FTA's Capital Investment Grant program, the alternatives considered in the NEPA process may be narrowed in those instances that the planning Alternatives Analysis required by *49 U.S.C. 5309*(e) is conducted as a planning study prior to the NEPA review. In fact, the FTA may be able to narrow the alternatives considered in detail in the NEPA document to the No-Build (No Action) alternative and the Locally Preferred Alternative. Alternatives must meet the following criteria if they are deemed sufficiently considered by a planning Alternatives Analysis under FTA's Capital Investment Grant program conducted prior to NEPA without a programmatic NEPA analysis and documentation:

. During the planning Alternatives Analysis, all of the reasonable alternatives under consideration must be fully evaluated in terms of their transportation impacts; capital and operating costs; social, economic, and environmental impacts; and technical considerations;

. There must be appropriate public involvement in the planning Alternatives Analysis;

. The appropriate Federal, State, and local environmental, regulatory, and resource agencies must be engaged in the planning Alternatives Analysis;

. The results of the planning Alternatives Analysis must be documented;

. The NEPA scoping participants must agree on the alternatives that will be considered in the NEPA review; and

. The subsequent NEPA document must include the evaluation of alternatives from the planning Alternatives Analysis.

The above criteria apply specifically to FTA's Capital Investment Grant process. However, for other transportation projects, if the planning process has included the analysis and stakeholder involvement that would be undertaken in a first tier NEPA process, then the alternatives screening conducted in the transportation planning process may be incorporated by reference, described, and relied upon in the project-level NEPA document. At that point, the project-level NEPA analysis can focus on the remaining alternatives.

12. What information or analysis from the transportation planning process is needed in an EA or EIS to support the elimination of an alternative(s) from detailed consideration?

The section of the EA or EIS that discusses alternatives considered but eliminated from detailed consideration should:

(a) Identify any alternatives eliminated during the transportation planning process (this could include broad categories of alternatives, as when a long-range transportation plan selects a general travel corridor based on a corridor study, thereby eliminating all alternatives along other alignments);

(b) Briefly summarize the reasons for eliminating the alternative; and

(c) Include a summary of the analysis process that supports the elimination of alternatives (the summary should reference the relevant sections or pages of the analysis or study) and incorporate it by reference or append it to the NEPA document.

Any analyses or studies used to eliminate alternatives from detailed consideration should be made available to the public and affected agencies during the NEPA scoping process and should be reasonably available during comment periods.

Alternatives passed over during the transportation planning process because they are infeasible or do not meet the NEPA "purpose and need" can be omitted from the detailed analysis of alternatives in the NEPA document, as long as the rationale for elimination is explained in the NEPA document. Alternatives that remain "reasonable" after the plan-

ning-level analysis must be addressed in the EIS, even when they clearly are not the preferred alternative. When the proposed action evaluated in an EA involves unresolved conflicts concerning alternative uses of available resources, NEPA requires that appropriate alternatives be studied, developed, and described.

Affected Environment and Environmental Consequences

13. What types of planning products provide analysis of the affected environment and environmental consequences that are useful in a project-level NEPA analysis and document?

The following planning products are valuable inputs to the discussion of the affected environment and environmental consequences (both its current state and future state in the absence of the proposed action) in the project-level NEPA analysis and document:

. Regional development and growth analyses;

. Local land use, growth management, or development plans; and

. Population and employment projections.

The following are types of information, analysis, and other products from the transportation planning process that can be used in the discussion of the affected environment and environmental consequences in an EA or EIS:

(a) GIS overlays showing the past, current, or predicted future conditions of the natural and built environments;

(b) Environmental scans that identify environmental resources and environmentally sensitive areas;

(c) Descriptions of airsheds and watersheds;

(d) Demographic trends and forecasts;

(e) Projections of future land use, natural resource conservation areas, and development; and

(f) The outputs of natural resource planning efforts, such as wildlife conservation plans, watershed plans, and multiple species habitat conservation plans.

However, in most cases, the assessment of the affected environment and environmental consequences conducted during the transportation planning process will not be detailed enough to meet NEPA standards and, thus, the inventory and evaluation of affected resources and the analysis of consequences of the alternatives will need to be supplemented with more refined analysis and possibly site-specific details during the NEPA process.

14. What information from the transportation planning process is useful in describing a baseline for the NEPA analysis of indirect and cumulative impacts?

Because the nature of the transportation planning process is to look broadly at future [*33555] land use, development, population increases, and other growth factors, the planning analysis can provide the basis for the assessment of indirect and cumulative impacts required under NEPA. The consideration in the transportation planning process of development, growth, and consistency with local land use, growth management, or development plans, as well as population and employment projections, provides an overview of the multitude of factors in an area that are creating pressures not only on the transportation system, but on the natural ecosystem and important environmental and community resources. An analysis of all reasonably foreseeable actions in the area also should be a part of the transportation planning process. This planning-level information should be captured and utilized in the analysis of indirect and cumulative impacts during the NEPA process.

To be used in the analysis of indirect and cumulative impacts, such information should:

(a) Be sufficiently detailed that differences in consequences of alternatives can be readily identified;

(b) Be based on current data (e.g., data from the most recent Census) or be updated by additional information;

(c) Be based on reasonable assumptions that are clearly stated; and/or

(d) Rely on analytical methods and modeling techniques that are reliable, defensible, and reasonably current.

Environmental Mitigation

15. How can planning-level efforts best support advanced mitigation, banking, and priorities for environmental mitigation investments?

A lesson learned from efforts to establish mitigation banks and advance mitigation agreements and alternative mitigation options is the importance of beginning interagency discussions during the transportation planning process. Development pressures, habitat alteration, complicated real estate transactions, and competition for potential mitigation sites by public and private project proponents can encumber the already difficult task of mitigating for "like" value and function and reinforce the need to examine mitigation strategies as early as possible.

Robust use of remote sensing, GIS, and decision support systems for evaluating conservation strategies are all contributing to the advancement of natural resource and environmental planning. The outputs from environmental planning can now better inform transportation planning processes, including the development of mitigation strategies, so that transportation and conservation goals can be optimally met. For example, long-range transportation plans can be screened to assess the effect of general travel corridors or density, on the viability of sensitive plant and animal species or habitats. This type of screening provides a basis for early collaboration among transportation and environmental staffs, the public, and regulatory agencies to explore areas where impacts must be avoided and identify areas for mitigation investments. This can lead to mitigation strategies that are both more economical and more effective from an environmental stewardship perspective than traditional project-specific mitigation measures.

III. Administrative Issues

16. Are Federal funds eligible to pay for these additional, or more in depth, environmental studies in transportation planning?

Yes. For example, the following FHWA and FTA funds may be utilized for conducting environmental studies and analyses within transportation planning:

. FHWA planning and research funds, as defined under 23 CFR part 420 (***e.g.***, Metropolitan Planning (PL), Statewide Planning and Research (SPR), National Highway System (NHS), Surface Transportation Program (STP), and Equity Bonus); and

. FTA planning and research funds *(49 U.S.C. 5303* and *49 U.S.C. 5313*(b)), urban formula funds *(49 U.S.C. 5307),* and (in limited circumstances) transit capital investment funds *(49 U.S.C. 5309).*

The eligible transportation planning-related uses of these funds may include: (a) Conducting feasibility or subarea/corridor needs studies and (b) developing system-wide environmental information/inventories (***e.g.***, wetland banking inventories or standards to identify historically significant sites). Particularly in the case of PL and SPR funds, the proposed expenditure must be closely related to the development of transportation plans and programs under *23 U.S.C. 134*-135 and *49 U.S.C. 5303*-5306.

For FHWA funding programs, once a general travel corridor or specific project has progressed to a point in the preliminary engineering/NEPA phase that clearly extends beyond transportation planning, additional in-depth environmental studies must be funded through the program category for which the ultimate project qualifies (***e.g.***, NHS, STP, Interstate Maintenance, and/or Bridge), rather than PL or SPR funds.

Another source of funding is FHWA's Transportation Enhancement program, which may be used for activities such as: Conducting archeological planning and research; developing inventories such as those for historic bridges and highways, and other surface transportation-related structures; conducting studies to determine the extent of water pollution due to highway runoff; and conducting studies to reduce vehicle-caused wildlife mortality while maintaining habitat connectivity.

The FHWA and the FTA encourage State DOTs, MPOs, and public transportation operators to seek partners for some of these studies from environmental, regulatory, and resource agencies, non-government organizations, and other government and private sector entities with similar data needs, or environmental interests. In some cases, these partners may contribute data and expertise to the studies, as well as funding.

17. What staffing or organizational arrangements may be helpful in allowing planning products to be accepted in the NEPA process?

Certain organizational and staffing arrangements may support a more integrated approach to the planning/NEPA decision-making continuum. In many cases, planning organizations do not have environmental expertise on staff or readily accessible. Likewise, the review and regulatory responsibilities of many environmental, regulatory, and resource agencies make involvement in the transportation planning process a challenge for staff resources. These challenges may be partially met by improved use of the outputs of each agency's planning resources and by augmenting their capabilities through greater use of GIS and remote sensing technologies (*see http://www.gis.fhwa.dot.gov/* for additional information on the use of GIS). Sharing databases and the planning products of local land use decision-makers and State and Federal environmental, regulatory, and resource agencies also provide efficiencies in acquiring and sharing the data and information needed for both transportation planning and NEPA work.

Additional opportunities such as shared staff, training across disciplines, and (in some cases) reorganizing to eliminate structural divisions between planning and NEPA practitioners may also need to be considered in order to better integrate NEPA considerations into transportation planning studies. The answers to the following two questions also contain useful information on training and staffing opportunities.

18. How have environmental, regulatory, and resource agency liaisons (Federally- and State DOT-funded positions) and partnership agreements been used to provide the expertise and interagency participation needed to enhance the consideration of environmental factors in the planning process?

For several years, States have utilized Federal and State transportation funds to support focused and accelerated project review by a variety of local, State, Tribal, and Federal agencies. While Section 1309(e) of the TEA-21 spoke specifically to transportation project streamlining, there are other authorities that have been used to fund positions, such as the Intergovernmental Cooperation Act *(31 U.S.C. 6505).* In addition, long-term, on-call consultant contracts can provide backfill support for staff that are detailed to other parts of an agency for temporary assignments. At last count (as of 2003), 246 positions were being funded. Additional information on interagency funding agreements is available at: *http://environment.fhwa.dot.gov/strmlng/igdocs/index.htm.*

Moreover, every State has advanced a variety of stewardship and streamlining initiatives that necessitate early involvement of environmental, regulatory, and resource agencies in the project development process. Such process improvements have: Addressed the exchange of data to support avoidance and impact analysis; established formal and informal consultation and review schedules; advanced mitigation strategies; and resulted in a variety of programmatic reviews. Interagency agreements and workplans have evolved to describe performance objectives, as well as specific roles and responsibilities related to new streamlining initiatives. Some States have improved collaboration and [*33556] efficiency by co-locating environmental, regulatory, and resource and transportation agency staff.

19.What training opportunities are available to MPOs, State DOTs, public transportation operators and environmental, regulatory, and resource agencies to assist in their understanding of the transportation planning and NEPA processes?

Both the FHWA and the FTA offer a variety of transportation planning, public involvement, and NEPA courses through the National Highway Institute and/or the National Transit Institute. Of particular note is the Linking Planning and NEPA Workshop, which provides a forum and facilitated group discussion among and between State DOT; MPO; Federal, Tribal, and State environmental, regulatory, and resource agencies; and FHWA/FTA representatives (at both the executive and program manager levels) to develop a State-specific action plan that will provide for strengthened linkages between the transportation planning and NEPA processes.

Moreover, the U. S. Fish and Wildlife Service offers Green Infrastructure Workshops that are focused on integrating planning for natural resources ("green infrastructure") with the development, economic, and other infrastructure needs of society ("gray infrastructure").

Robust planning and multi-issue environmental screening requires input from a wide variety of disciplines, including information technology; transportation planning; the NEPA process; and regulatory, permitting, and environmental specialty areas (*e.g.*, noise, air quality, and biology). Senior managers at transportation and partner agencies can arrange a variety of individual training programs to support learning curves and skill development that contribute to a strengthened link of the transportation planning and NEPA processes. Formal and informal mentoring on an intra-agency basis can be arranged. Employee exchanges within and between agencies can be periodically scheduled, and persons involved with professional leadership programs can seek temporary assignments with partner agencies.

Transportation planning and NEPA courses offered by various agencies and private sources have been compiled as part of the Executive Order 13274 (Environmental Stewardship and Transportation Infrastructure Project Reviews) workgroup efforts. This list is posted at *http://www.fhwa.dot.gov/stewardshipeo/index.htm.*

IV. Additional Information on This Topic

Valuable sources of information are FHWA's environmental streamlining Web site (*http://environment.fhwa.dot.gov/strmlng/index.htm*) and FTA's environmental streamlining Web site (*http://www.environment.fta.dot.gov*). Another source of information and case studies is NCHRP Report 8-38 (Consideration of Environmental Factors in Transportation Systems Planning), which is available at *http://www4.trb.org/trb/crp.nsf/All+Projects/NCHRP+8-38*. In addition, AASHTO's Center for Environmental Excellence Web site is continuously updated with news and links to information of interest to transportation and environmental professionals (*http://www.transportation.environment.org*).

Appendix B to Part 450--Fiscal Constraint of Transportation Plans and Programs [Revised]

Background

For over 40 years, the Congress has directed that federally-funded highway and transit projects must flow from metropolitan and statewide transportation planning processes (pursuant to *23 U.S.C. 134*-135 and *49 U.S.C. 5303*-5304). The Congress further refined and strengthened the planning process as the foundation for project decisions when it first enacted fiscal constraint provisions for transportation plans and programs as part of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA).

Fiscal constraint requires that revenues (Federal, State, local, and private) in transportation planning and programming are identified and "reasonably expected to be available" to implement projects required to be included in the metropolitan transportation plan, metropolitan Transportation Improvement Program (TIP), and the Statewide Transportation Improvement Program (STIP), while providing for the operation and maintenance of the existing highway and transit systems. Fiscal constraint has remained a key component of transportation plan and program development with the enactment of the Transportation Equity Act for the 21st Century (TEA-21) in 1998 and the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) on August 10, 2005.

The fiscal constraint requirement is intended to ensure that metropolitan transportation plans, TIPs, and STIPs reflect realistic assumptions about future revenues, rather than extensive lists including more projects than could realistically be completed with available revenues. Importantly, for the purposes of developing the metropolitan transportation plan and TIP, the MPO, State DOT, and public transportation operator(s) must cooperatively develop estimates of funds that will be available to support plan and program implementation *[23 U.S.C. 134* (i)(2)(C), *23 U.S.C. 134*(j)(1)(C), *49 U.S.C. 5301*(a)(1), *49 U.S.C. 5303*(j)(2)(C), and *49 U.S.C. 5303*(j)(2)(C)]. In addition, the Clean Air Act's transportation conformity regulations specify that a conformity determination can only be made on a fiscally constrained metropolitan transportation plan and TIP [*40 CFR 93.108*]. Given this intent, compliance with the fiscal constraint requirement entails an analysis of revenues and costs to address the following fundamental question:

"Will the revenues (Federal, State, local, and private) identified in the TIP, STIP, or metropolitan transportation plan cover the anticipated costs of the projects included in this TIP, STIP, or metropolitan transportation plan, along with operation and maintenance of the existing system?"

If the projected revenues are sufficient to cover the costs, and the estimates of both revenues and costs are reasonable, then the fiscal constraint requirement has been satisfied. Additionally, projects in air quality nonattainment and maintenance areas can be included in the first two years of the TIP and STIP only if funds are "available or committed."

The FHWA and the FTA also realize the challenges associated with forecasting project and program costs and revenues, particularly in the "outer years" of a metropolitan transportation plan. Therefore, the FHWA/FTA provide a great deal of flexibility in demonstrating fiscal constraint. For example, in years when a Federal transportation authorization bill is not yet enacted, State DOTs, MPOs, and public transportation operators may project and assume Federal revenues for the "outer years" based on a trend line projection. Additional information is provided in the following sections and the "Questions and Answers."

"Reasonably Available" Future Revenues and "Available or Committed" Funds

Revenue forecasts to support projects required to be included in a metropolitan transportation plan, TIP, and STIP may take into account new funding sources that are "reasonably expected to be available." New funding sources are revenues that do not currently exist or that may require additional steps before the State DOT, MPO, or public transportation operator can commit such funding to transportation projects. As first required in ISTEA, these planned new revenue sources must be clearly identified.

Future revenues may be projected based on historic trends, including consideration of past legislative or executive actions. The level of uncertainty in projections based on historical trends is generally greatest for revenues in the "outer years" of a metropolitan transportation plan (*i.e.*, those beyond the first 10 years of the metropolitan transportation plan). Additionally, for purposes of developing the financial plan to support the metropolitan transportation plan, the FHWA and the FTA encourage the use of aggregate "cost ranges/cost bands" to define costs in the outer years of the metropolitan transportation plan, with the caveat that the future funding sources must be "reasonably available."

To support air quality planning under the 1990 Clean Air Act Amendments, a special requirement has been placed on air quality nonattainment and maintenance areas, as designated by the U. S. Environmental Protection Agency (EPA). Specifically, projects in air quality nonattainment and maintenance areas can be included in the first two years of the TIP and STIP only if funds are "available or committed." Additionally, EPA's transportation conformity regulations specify that an air quality conformity determination can only be made on a fiscally constrained metropolitan transportation plan and TIP [*40 CFR 93.108*]. Therefore, nonattainment and maintenance areas may not rely upon proposed new taxes or other new revenue sources for the first two years of the TIP and STIP. Thus, new funding from a proposed gas tax increase, a proposed regional sales tax, or a major funding increase still under debate would not qualify as [*33557] "available or committed" until it has been enacted by legislation or referendum.

Changes in Revenues or Costs After the Metropolitan Transportation Plan, TIP, or STIP are Adopted

In cases that the FHWA and the FTA find a metropolitan transportation plan or TIP/STIP to be fiscally constrained and a revenue source is subsequently removed (*i.e.*, by legislative or administrative actions), the FHWA and the FTA will not withdraw the original determination of fiscal constraint. In such cases, the FHWA and the FTA will require the State DOT or MPO to identify alternative sources of revenue as soon as possible. Importantly, the FHWA and FTA will not act on new or amended metropolitan transportation plan, TIP, or STIP unless they reflect the changed revenue situation.

The same policy applies if project costs or operations/maintenance cost estimates change after a metropolitan transportation plan, TIP, or STIP are adopted. Such a change in cost estimates does not invalidate the adopted transportation plan or program. However, the revised costs must be provided in new or amended metropolitan transportation plan, TIP, or STIP. The FHWA and the FTA will not approve new or amended STIPs that are based on outdated or invalid cost estimates.

System Preservation, Operations, and Maintenance Costs

Since the enactment of ISTEA in 1991, fiscal constraint has encompassed operation and maintenance (O&M) of the system, as well as capital projects. On one hand, O&M activities typically do not involve Federal funds and are not listed individually in a metropolitan transportation plan, TIP, or STIP. However, the financial plans that support the metropolitan and statewide transportation planning processes must assess the adequacy of all sources of capital and O&M investment necessary to ensure the preservation of the existing transportation system, including provisions for operational improvements, resurfacing, restoration, and rehabilitation of existing and future major roadways, as well as operations, maintenance, modernization, and rehabilitation of existing and future transit facilities. To support this assessment, the FHWA and the FTA expect that the State DOT, MPO, and public transportation operator(s) will provide credible cost estimates.

However, the FHWA and FTA largely defer to State and local governments and public transportation operators to define the specific level of systems O&M that is appropriate, since the FHWA and the FTA do not mandate a particular, specific level of O&M. Instead, the Federal government accepts that State and local governments, MPOs, and public transportation operators will adjust their O&M from year-to-year and decade-to-decade, based on community desires and requirements established through an open transportation planning process.

Outside the transportation planning process, there also is a longstanding Federal requirement that States properly maintain, or cause to be maintained, any projects constructed under the Federal-aid Highway Program *[23 U.S.C. 116]*. However, beyond this basic requirement of proper maintenance, the FHWA and the FTA do not question State and local

government, MPO, or public transportation operator decisions on specific uses of funding or question State and local priorities that balance the operation and maintenance of the existing transportation system with needs for transportation system expansion. Instead, the FHWA and the FTA ensure that the process used by the State DOT, MPO, and public transportation operator(s) to establish priorities is consistent with the transportation planning statute and regulations and that the funding sources identified to address these priorities are "reasonably expected to be available." In addition, consistent with regulations implementing the Clean Air Act, the FHWA and the FTA will also continue to assure that priority is given to the timely implementation of transportation control measures in the air quality State Implementation Plan [*40 CFR 93.103* and *40 CFR 93.116*].

There is a subtle yet important distinction between projects or project phases listed in the TIP/STIP and the financial plan/financial information that supports the TIP/STIP. It is not required that all highway and transit O&M projects be included in the TIP/STIP, per se. However, these systems-level O&M costs and revenues must be reflected in the financial plan that accompanies and supports the TIP/STIP. Similarly, the O&M costs reflected in the financial plan for the first two years of the TIP/STIP in nonattainment and maintenance areas are not subject to the "available or committed" requirement. Rather, they must be "reasonably expected to be available."

Funding Gaps

Substantial investments have been made in highway and transit infrastructure. The short- and long-term needs for system preservation, operation, and maintenance can be enormous. Simply maintaining the existing system in a State or large metropolitan area can demand billions of dollars in investments, while system expansion demands investments of a similar scale. At times, the combination of these competing demands can cause temporary shortfalls in a State's or MPO's budget. To the extent there appear to be shortfalls, the MPO or State DOT must identify a strategy to address these funding gaps prior to the adoption of an updated metropolitan transportation plan, TIP, or STIP (or the amendment of an existing metropolitan transportation plan, TIP or STIP). The strategy should include a plan of action that describes the steps that will be taken to make funding available within the timeframe shown in the financial plan needed to implement the projects in the metropolitan transportation plan. The strategy may rely upon the past history of the State, MPO, or public transportation operator(s) to obtain funding. If the strategy relies on new funding sources, the MPO, State, public transportation operator(s) must demonstrate that these funds are "reasonably expected to be available."

Questions and Answers

Statewide and Metropolitan Transportation Improvement Program (STIP and TIP):

1. How should Federal and State funding be reflected in the TIP and STIP?

The Federal funding reflected in the TIP and STIP may be based on authorization levels for each year of the TIP and/or STIP, although obligation authority limitations could be utilized as a more conservative approach. In addition, for federally-funded projects, the TIP and/or STIP must identify the appropriate "matched funds," by source. Importantly, because the State DOT will be involved in the development of all TIPs (as well as the STIP), the cumulative total of the State/Federal funds in the TIPs and STIP must not exceed, on an annual basis, the total State/Federal funds reasonably available to the State.

Financial forecasts (for revenues and costs) to develop TIPs and STIPs (as well as for metropolitan transportation plans) must utilize an inflation rate to reflect "year of expenditure dollars" to account for the time-based value of money. The inflation rate(s) should be based on sound, reasonable financial principles and information, developed cooperatively by the State DOT, MPOs, and public transportation operators. To ensure consistency, similar financial forecasting approaches should be utilized for all TIPs and STIPs in a given State. In addition, the financial forecast approaches, assumptions, and results should be clear and well-documented.

2. How should transit O&M activities and costs be treated in the TIP and STIP and their supporting financial plans?

With the exception of federally-supported transit operating costs in urbanized areas with populations less than 200,000, transit O&M activities are not required to be listed individually in the TIP, STIP, and metropolitan transportation plan. However, the supporting financial plans for the TIP, STIP, and metropolitan transportation plan must demonstrate the ability of operators to adequately operate and maintain their existing systems, as well as the new projects and strategies listed in the TIP, STIP, and metropolitan transportation plan. "Adequate" levels of transit service and associated O&M costs are determined by local officials, who may decide to defer maintenance and/or increase operating revenues as a means of balancing their budgets.

3. How exact should the funding estimates for O&M be for the financial plans/information that support the TIP and STIP?

Revenue and cost estimates for O&M will be more general than estimates for individual projects. For the financial plan that must accompany the TIP, the MPO may rely on the information contained in the financial plan that supports the metropolitan transportation plan to develop four-year "snapshot" estimates of O&M funding sources and costs. Similarly for the STIP, the State DOT may utilize other documents (*e.g.*, the long-range statewide transportation plan and/or State DOT budget information) to demonstrate sufficient resources for the operations and maintenance of the State surface [*33558] transportation system for at least the time period covered by the STIP. O&M involving local and/or State funds may be shown as a "grouped line item" in the financial plans for the TIP and STIP.

The FHWA and the FTA generally rely on the overall O&M information and analysis provided in support of the metropolitan and statewide transportation plans, including information on substantial changes to revenue streams for short-term (*i.e.*, programming-level) operations and maintenance expenditures. It is also reasonable to rely on supplemental State DOT information for non-metropolitan areas if similar information and/or analysis are not contained in a financial plan for the long-range statewide transportation plan or the TIP and STIP. Additionally, knowledge of local and/or State funding levels and previous year expenditures related to operations and maintenance compared to systems-level performance measures (*e.g.*, pavement and/or bridge conditions) can provide insightful information on the reasonableness of future local and/or State investments on highway and transit O&M.

Possible sources of data for O&M revenues and costs for States and MPOs to use in collecting this information for the State and local highway systems include the *Highway Statistics* n1 publication, capital improvement programs or budgets, and pavement management systems. For transit O&M costs, the best data sources likely are the public transportation operators and/or the units of government that are responsible for the public transit system(s), as well as the information contained in FTA's financial capacity reviews conducted for its Section 5307 (Urbanized Formula) and Section 5309 (New Starts, Bus, and Rail Modernization) programs. n2 The key is for State DOTs, MPOs, and public transportation operators (via the "3-C" planning process) to coordinate with the various local agencies to determine the best sources of these data.

n1 The FHWA's Highway Statistics Series consists of annual reports containing analyzed statistical data on motor fuel; motor vehicles; driver licensing; highway-user taxation; State and local government highway finance; highway mileage, and Federal-aid for highways. These data are presented in tabular format as well as selected charts and have been published each year since 1945. The annual Highway Statistics reports are available from the FHWA's Office of Highway Policy Information at *http://www.fhwa.dot.gov/policy/ohpi/hss/index.htm.*

n2 Additional information on FTA's Section 5307 and Section 5309 programs is available from the FTA at *http://www.fta.dot.gov.*

As a condition for applying for grants under FTA's Section 5307 and Section 5309 programs, public transportation operators are required to self-certify their financial capacity to pay current costs from existing revenues and to meet expansion costs in addition to their existing operations from projected revenues. The FTA assesses the adequacy of financial capacity self-certifications at the TIP/STIP approval stage and for any capital grant approval (FTA's Capital Investment Grant program in *49 U.S.C. 5309* includes additional financial assessment requirements). Similar to the joint FHWA/FTA certification of the metropolitan panning processes in Transportation Management Areas, deficiencies are recorded for grantees that do not meet financial capacity requirements. The requirements, set forth in FTA Circular 7800.1A (Financial Capacity Policy), n3 call for public transportation operators to "* * *maintain and operate current assets, and to operate and maintain the new assets on the same basis, providing at least the same level of service for at least one replacement cycle, or 20 years, as appropriate." Public transportation operators could attach their financial capacity self-certifications, with appropriate supporting information, to the financial plan supporting the TIP/STIP.

n3 FTA Circular 7800.1A (Financial Capacity Policy) was last updated on January 30, 2002, and is available from the FTA at *http://www.fta.dot.gov/legal/guidance/circulars/7000/424-1081-ENG-HTML.htm.*

4. Must innovative finance mechanisms be reflected in the TIP/STIP? To what extent must Advance Construction (AC) be shown in the TIP/STIP?

Yes, innovative financing techniques (*e.g.*, tolls, Grant Anticipated Revenue Vehicles (GARVEE bonds), State Infrastructure Banks (SIBs), and Transportation Infrastructure Finance and Innovation Act (TIFIA)) must be reflected in the TIP and/or STIP. Additional information on innovative finance can be obtained via the Internet at the following FHWA and FTA Web sites:

. FHWA Innovative Finance Guidance *http://www.fhwa.dot.gov/innovativefinance/ifguidnc.htm*

. FTA Innovative Finance Guidance *http://www.fta.dot.gov/1263-ENG-HTML.htm*

. FTA Flexible Funds Guidance *http://www.fta.dot.gov/1254-ENG-HTML.htm*

Advance Construction (AC) and partial conversion of advanced construction (PCAC) are cash flow management tools that allow States to begin projects with their own funds and only later convert these projects to Federal assistance. AC allows a State to request and receive approval to construct Federal-aid projects in advance of the apportionment of authorized Federal-aid funds. Typically, States (at their discretion) "convert" AC projects to Federal-aid at any time sufficient Federal-aid funds and obligation authority are available at one time. Under PCAC, a State (at its discretion) partially "converts" AC projects to Federal-aid funds in stages.

Title *23, U.S.C., section 115*(c) specifies that an AC project application may be approved "* * * only if the project is included in the STIP." Because AC does not constitute a commitment of Federal funds to a project, the financial plan and/or funding information for the TIP and STIP, respectively, need to demonstrate sufficient non-Federal revenues to provide 100 percent funding for the projects listed as "AC" in the TIP and/or STIP. The total amount of allowable AC in the TIP and/or STIP is determined by: (a) The State's current unobligated balance of apportionments; and (b) the amount of Federal funds anticipated in the subsequent fiscal years of an approved STIP.

In practice, an AC project/project phase essentially is included in the TIP and/or STIP at two different points in time: (a) As State or local funds prior to the initial authorization of the AC project (including an assurance from the State that adequate State funds are available to "front" the cost of the project/project phase); and (b) prior to the authorization of the project/project phase to "convert" it from AC to a Federal-aid funding program (including a demonstration from the State that this "conversion" maintains fiscal constraint with other Federal-aid projects). Therefore, in the year of an AC project's "conversion," the project is considered as both a State revenue source and a Federal-aid debit. Similarly, Federal funding utilized to make payments on debt instruments such as GARVEE bonds must be deducted from the amounts of Federal funds available for new federally-funded projects. In either case, the TIP and/or STIP should show the obligation of Federal-aid category funds and the resultant increase in available non-Federal funds.

5. To what extent can future Federal program funds be assumed for developing TIPs and STIPs, particularly beyond the current authorization or appropriations period?

When the TIP or STIP period extends beyond the current authorization period for Federal program funds, "available" funds may include an extrapolation based on historic authorizations of Federal funds that are distributed by formula. For Federal funds that are distributed on a discretionary basis (including FTA Section 5309, earmarks, and congressionally-designated funding), any funding beyond that currently authorized and targeted to the area may be considered as reasonably available, if past history supports such funding levels.

Therefore, when determining future year authorizations/apportionments, the growth rate as determined through the previous authorizations can be used to approximate the future annual growth rate of Federal authorizations. For example, since the TEA-21 was a six-year bill, the growth rate could be determined over the entire authorization period (fiscal year (FY) 1998-FY 2003), but excluding the Revenue Aligned Budget Authority from the calculations.

Upon the enactment of new authorizing legislation, State DOTs (in conjunction with MPOs and public transportation operators) must utilize the actual authorization levels and individual discretionary project funding amounts in the development of any updated TIP/STIP or amendment of an existing TIP/STIP.

Metropolitan Transportation Plan

6. How should revenues from "public-private partnerships" be treated?

"Public-private partnerships" (PPP) are an emerging area related to transportation finance that refer to contractual agreements formed between a public agency and private sector entity that allow for greater private sector participation in the delivery of transportation projects. Traditionally, private sector participation has been limited to separate planning, design, or construction contracts as a fee-for-service arrangement, based on the public agency's specifications. [*33559] Expanding the private sector role allows the public agencies to tap private sector technical, management, and financial resources in new ways to achieve certain public agency objectives (*e.g.*, greater cost and schedule certainty, supplementing in-house staff, innovative technology applications, specialized expertise, or access to private capital). The private partner can expand its business opportunities in return for assuming these new or expanded responsibilities

and risks. Additional information on new PPP approaches to project delivery can be obtained via the Internet at *http://www.fhwa.dot.gov/ppp/index.htm.*

The PPP projects often are undertaken to supplement conventional procurement practices by taking additional revenue sources and mixing a variety of funding sources, thereby reducing demands on constrained public budgets. Some of the revenue sources used to support PPPs include: (a) Shareholder equity; (b) grant anticipation bonds (GARVEEs and Grant Anticipation Notes); (c) general obligation bonds; (d) SIB loans; (e) direct user charges (tolls and transit fares) leveraged to obtain bonds; and (f) other public agency dedicated revenue streams made available to a private franchisee or concessionaire (*e.g.*, leases, direct user charges from other tolled facilities, and shadow tolls). Additional information on these financing approaches and tools is available online from the American Association of State and Transportation Officials at *http://www.InnovativeFinance.org.*

Within the financial plan that supports the metropolitan transportation plan, a prospective PPP should be addressed on a case-by-case basis, reflected as a source that is "reasonably expected to be available."

7. How should future costs be estimated and documented?

Financial forecasts (for revenues and costs) to support the metropolitan transportation plan (as well as the TIP and STIP) must utilize an inflation rate to reflect "year of expenditure dollars" to account for the time-based value of money. The inflation rate(s) should be based on sound, reasonable financial principles and information, developed cooperatively by the MPO, State DOT, and public transportation operator(s). To ensure consistency, similar financial forecasting approaches should be utilized for the metropolitan transportation plan and TIP in a given MPO.

Cost forecasts can be established in a number of ways. For example, O&M can be based on historic data applied on a per-lane mile and functional classification basis or an annual lump sum basis. Capital costs can be based on historic costs for: (a) An interchange; (b) new construction on new rights-of-way; (c) structure (number, type, and deck square footage (area) for various structure types); (d) transit vehicles for rolling stock procurement; or (e) widening and/or reconstruction, based on the extent of the project. In addition, capital cost estimates can be based on project-specific estimates contained in planning, environmental, or engineering studies, and updated as new information is prepared as part of project development.

Transit operating costs can be estimated by general mode type on a revenue-mile or passenger-mile basis, in accordance with the following principles: (a) Reflect historic operations; (b) anticipate future operations; (c) address all functional responsibilities of the transit property; (d) focus on major cost components; (e) apply consistent level of service data: (f) apply peer transit property experience; (g) apply readily available information; (h) provide fully-allocated costs for use in cost-effectiveness analysis; (i) structure for sensitivity analyses; and (j) document model theory and application [for additional information, see "Chapter 2: Principles of Operating and Maintenance Cost Modeling" in Estimation of Operating and Maintenance Costs for Transit Systems, available on the FTA Web site at *http://www.fta.dot.gov/transit-data-info/reports-publications/publications/finance/estimation-operating/1210-2455-ENG-HTML.htm*]. Transit system capital costs involve the estimation of capital costs for a broad variety of project components and the projection of future construction. Special consideration should be given to factors such as design changes, component upgrades, lengthened construction schedules, and the effects of general price inflation.

Revenues and related cost estimates for O&M should be based on a reasonable, documented process. Some accepted practices include:

. Trend analysis (a functional analysis based on expenditures over a given duration, in which costs or revenues are increased by inflation, as well as a growth percentage based on historic levels). This analysis could be linear or exponential. When using this approach, however, it is important to be aware of new facilities or improvements to existing facilities. Transit operations and maintenance costs will vary with the average age of the bus or rail car fleet.

. Cost per unit of service (*e.g.*, lane-mile costs, centerline mile costs, traffic signal cost, transit peak vehicles by vehicle type, revenue hours, and vehicle-miles by vehicle type).

Regardless of the methodology employed, the assumptions should be adequately documented by the State DOT, the MPO, and the public transportation operator, ideally reflected in the State DOT and the MPO self-certification statements on the statewide and metropolitan transportation planning processes.

The FHWA and the FTA recognize that estimating current and reasonably available new revenues and required operations and maintenance costs over a 20-year planning horizon is not an "exact science." To provide discipline and

rigor, public agencies should attempt to be as realistic as possible, as well as ensure that all costs assumptions are publicly documented.

8. Does the financial plan need to include O&M costs for the entire transportation system or simply the portion for which the State is responsible? How should operations and maintenance be reflected in the financial plan?

Titles *23, U.S.C., Section 134*(i)(2)(D) and *49, U.S.C., Section 5303*(i)(2)(D) require development of a metropolitan transportation plan that includes capital investment and other strategies to preserve the existing and projected future infrastructure needs. It also requires operational and management strategies *[23 U.S.C. 134*(i)(2)(E) and *49 U.S.C. 5303*(i)(2)(E)] to improve the performance of existing transportation facilities. The metropolitan transportation plan also must contain a financial plan that demonstrates how the adopted transportation plan can be implemented, indicating resources from public and private sources that are reasonable expected to be made available to carry out the transportation plan *[23 U.S.C. 134*(i)(2)(C) and *49 U.S.C. 5303*(i)(2)(C)]. Therefore, the financial plan that supports the metropolitan transportation plan must reflect the estimated costs of constructing, operating, and maintaining the total (existing plus planned) transportation system, including portions of the system owned and operated by local governments.

Other Issues

9. What are some examples of "reasonable" and "not reasonable" revenue forecasting assumptions?

Whether or not a funding source is reasonable may require a judgment call. Illustrative (but not all-inclusive) examples of "reasonable" and "not reasonable" assumptions are highlighted in the following table. Please note, however, that those described as "reasonable" do not necessarily meet the special test of "available or committed" funds.

Reasonable	A new toll with funds to be dedicated to a particular project or program may be reasonable, if supported by the Governor and there are indications of other support needed to enact or institute the toll.
Reasonable	A new local gas or sales tax requiring State legislation is reasonable if there are indications of sufficient support to enact the new tax.
Not reasonable	Funds from an upcoming ballot initiative would not be reasonable if polls indicate strong likelihood of defeat or there is a history of repeated defeat of similar ballot initiatives in recent years.
Not reasonable	A 25 percent increase in gas tax revenues over five years is not reasonable if the increase in the previous five years was only 15 percent, unless there are special circumstances to justify and support a significantly higher increase than the historic rate.
Not reasonable	An assumption that the metropolitan area will receive 30 percent of a Federal discretionary program (e.g., FTA New Starts) is not reasonable if the area has never received more than 10 percent in the past, unless there are special circumstances to justify and support such an assumption.

10. What is the connection (if any) between financial plans that support Statewide and metropolitan transportation plans and programs and financial/funding information for FHWA major projects and FTA Capital Investment Grant projects?

In general, the financial plans that support statewide and metropolitan transportation plans and programs do not need to contain the specific cash flow schedule information that typically is included for FHWA major projects (projects with an estimated total cost of $ 500 million or more, pursuant to Section 1904 of the SAFETEA-LU) or FTA Capital Investment Grant program projects. However, because a large-scale transportation project likely will have a substantial effect on a Statewide or metropolitan transportation plan and program, this project-specific cash flow schedule informa-

tion can serve as a valuable resource on annual levels and sources of revenues for developing the financial plans that support Statewide and metropolitan transportation plans and programs.

Additional information on financial planning for FHWA major projects and FTA New Starts projects can be obtained via the Internet at:

. FHWA Financial Plan Guidance (May 23, 2000) *http://www.fhwa. dot.gov/programadmin/ mega/fplans. htm#fpgmemo*

. FHWA Major Project Program Cost Estimating Guidance (June 4, 2004) *http://www.fhwa .dot.gov/programadmin /mega/cefinal.htm*

. Guidance for Transit Financial Plans (June 2000) *http://www.fta.dot.gov/ documents/gftfp.pdf*

. "Financial Planning for Transit" in Procedures and Technical Methods for Transit Project Planning

http://www. fta.dot.gov/ grant-programs/ transportation- planning/major- investment/ technical- guidance/16352-ENG-HTML.htm

. Estimation of Operating and Maintenance Costs for Transit Systems (December 1992) *http://www.fta. dot.gov/transit- data- info/reports- publications/ publications/ finance/1210- ENG-HTML.htm*

PART 500--MANAGEMENT AND MONITORING SYSTEMS

2. Revise the authority citation for part 500 to read as follows:

Authority: *23 U.S.C. 134,* 135, 303, and 315; *49 U.S.C. 5303*-5305; *23 CFR 1.32*; and *49 CFR 1.48* and *1.51*.

3. Revise § 500.109 to read as follows:

§ 500.109 CMS.

(a) For purposes of this part, congestion means the level at which transportation system performance is unacceptable due to excessive travel times and delays. Congestion management means the application of strategies to improve system performance and reliability by reducing the adverse impacts of congestion on the movement of people and goods in a region. A congestion management system or process is a systematic and regionally accepted approach for managing congestion that provides accurate, up-to-date information on transportation system operations and performance and assesses alternative strategies for congestion management that meet State and local needs.

(b) The development of a congestion management system or process should result in performance measures and strategies that can be integrated into transportation plans and programs. The level of system performance deemed acceptable by State and local officials may vary by type of transportation facility, geographic location (metropolitan area or subarea and/or non-metropolitan area), and/or time of day. In both metropolitan and non-metropolitan areas, consideration needs to be given to strategies that manage demand, reduce single occupant vehicle (SOV) travel, and improve transportation system management and operations. Where the addition of general purpose lanes is determined to be an appropriate congestion management strategy, explicit consideration is to be given to the incorporation of appropriate features into the SOV project to facilitate future demand management strategies and operational improvements that will maintain the functional integrity of those lanes.

TITLE 49--TRANSPORTATION

4. Revise 49 CFR part 613 to read as follows:

PART 613--METROPOLITAN AND STATEWIDE PLANNING

Subpart A--Transportation Planning and Programming Definitions

Sec.

613.100 Definitions.

Subpart B--Statewide Transportation Planning and Programming

613.200 Statewide transportation planning and programming.

Subpart C--Metropolitan Transportation Planning and Programming

450.300 Metropolitan transportation planning and programming.

Subpart A--Transportation Planning and Programming Definitions

§ 613.100 Definitions.

The regulations in 23 CFR 450, subpart A, shall be followed in complying with the requirements of this subpart.

Subpart B--Statewide Transportation Planning and Programming

§ 613.200 Statewide transportation planning and programming.

The regulations in 23 CFR 450, subpart B, shall be followed in complying with the requirements of this subpart.

Subpart C--Metropolitan Transportation Planning and Programming

§ 613.300 Metropolitan transportation planning and programming.

The regulations in 23 CFR 450, subpart C, shall be followed in complying with the requirements of this subpart.

Issued on: June 1, 2006.

J. Richard Capka,

Administrator, Federal Highway Administration.

Sandra K. Bushue,

Deputy Administrator, Federal Transit Administration.

[FR Doc. 06-5145 Filed 6-2-06; 10:22 am]

BILLING CODE 4910-22-P

FEDERAL REGISTER

Vol. 72, No. 030

Rules and Regulations

DEPARTMENT OF TRANSPORTATION (DOT)

Federal Highway Administration (FHWA)

DEPARTMENT OF TRANSPORTATION (DOT)

Federal Transit Administration

23 CFR Parts 450 and 500

49 CFR Part 613

[Docket No. FHWA-2005-22986]

RIN 2125-AF09; FTA RIN 2132-AA82

Statewide Transportation Planning; Metropolitan Transportation Planning

Part III

72 FR 7224

DATE: Wednesday, February 14, 2007

ACTION: Final rule.

SUMMARY: This final rule revises the regulations governing the development of metropolitan transportation plans and programs for urbanized areas, State transportation plans and programs and the regulations for Congestion Management Systems. The revision results from the passage of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) (Pub. L. 109-59, August 10, 2005), which also incorporates changes initiated in its predecessor legislation, the Transportation Equity Act for the 21st Century (TEA-21) (Pub. L. 105-178, June 9, 1998) and generally will make the regulations consistent with current statutory requirements.

EFFECTIVE DATE: March 16, 2007.

FOR FURTHER INFORMATION CONTACT: For the FHWA: Mr. Larry D. Anderson, Planning Oversight and Stewardship Team (HEPP-10), (202) 366-2374, Mr. Robert Ritter, Planning Capacity Building Team (HEPP-20), (202) 493-2139, or Ms. Diane Liff, Office of the Chief Counsel (HCC-10), (202) 366-6203. For the FTA: Mr. Charles Goodman, Office of Planning and Environment, (202) 366-1944, Mr. Darin Allan, Office of Planning and Environment, (202) 366-6694, or Mr. Christopher VanWyk, Office of Chief Counsel, (202) 366-1733. Both agencies are located at 400 Seventh Street SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m for FHWA, and 9 a.m. to 5:30 p.m. for FTA, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: Interested parties may access all comments on the NPRM received by the U.S. Department of Transportation (USDOT) online through the Docket Management System (DMS) at *http://dms.dot.gov.* The DMS Web site is available 24 hours each day, 365 days each year. Follow the instructions online. Additional assistance is available at the help section of the Web site.

An electronic copy of this final rule may be downloaded using the Office of the Federal Register's Web page at: *http://www.archives.gov* and the Government Printing Office's Web page at: *http://www.gpoaccess.gov/index.html.*

Background

The regulations found at 23 CFR 450 and 500 and 49 CFR 613 outline the requirements for State Departments of Transportation (DOTs), Metropolitan Planning Organizations (MPOs) and public transportation operators to conduct a continuing, comprehensive and coordinated transportation planning and programming process in metropolitan areas and States. These regulations have not been comprehensively updated or revised since October 28, 1993. Since that time, Congress has enacted several laws that affect the requirements outlined in these regulations (e.g. such as the TEA-21 and the SAFETEA-LU). Therefore, the agencies needed to update these regulations to be consistent with current statutory requirements.

Notice of Proposed Rulemaking:

On June 9, 2006, the agencies published, in the **Federal Register**, a notice of proposed rulemaking (NPRM) proposing to revise the regulations governing the development of statewide and metropolitan transportation plans and programs and the regulations for Congestion Management Systems *(71 FR 33510).* The comment period remained open until September 7, 2006. During the comment period on the proposed rule, the FTA and the FHWA held six public outreach workshops and a national telecast, also available on the World Wide Web. Those meetings provided an opportunity for FTA and FHWA to provide an overview of the NPRM and offer clarification of selected provisions. Comments were not solicited at those meetings, and attendees were encouraged to submit all comments to the official docket. A summary of the issues raised at the meetings and the general response of the FTA and the FHWA presenters, along with copies of the materials presented at the meeting, is included in the docket (item Number 27).

In addition, the FHWA and the FTA responded to requests for presentations at several regularly scheduled meetings or conferences of national and regional professional, industry or advocacy organizations during the comment period of the NPRM.

Discussion of Comments

In response to the NPRM, we received over 150 documents (representing more than 1,600 comments) submitted to the docket as reflected in the summary below (and spreadsheet on file in the docket). The following discussion summarizes our response. We received diverse and even opposing comments. General comments concerning the rule are addressed initially, followed by specific responses to individual sections of the regulatory proposals.

We categorized the comments received by the type of organization that submitted the comments. The following categories are used throughout this discussion: State DOTs; MPOs, councils of government (COGs) and regional planning agencies; national and regional professional, industry or advocacy organization (which includes organizations representing State DOTs, MPOs, COGs or other agencies whose individual comments may be included in a different category), local/regional transit agency; general public; city/county (other sub-State government); State (other agency, Governor, Legislator); Federal agency and other.

State DOTs submitted almost one-quarter of the documents, which account for almost one-third of all comments. MPOs, COGs and regional planning agencies submitted slightly more than one-third of the documents, also accounting for approximately one-third of the comments. National and regional professional, industry or advocacy organizations submitted over one-quarter of the documents and approximately one-quarter of the comments. Local/regional transit agencies submitted approximately 5 percent of the documents. Other organizations or individuals submitted the remainder. Most State DOTs and some other commenters wrote in support of the comments submitted by the American Association of State Highway and Transportation Officials (AASHTO). Many MPOs and COGs and some other commenters wrote in support of the comments submitted by the Association of Metropolitan Planning Organizations (AMPO) and/or the National Association of Regional Councils (NARC). Several public transportation operators and others wrote in support of the comments submitted by the American Public Transportation Association (APTA).

The FHWA and the FTA received comments on almost all sections of the [*7225] rule. The largest number of individual comments we received were on fiscal constraint issues. Other sections with more than five percent of the overall comments included: § 450.104 (Definitions), § 450.216 (Development and content of the statewide transportation improvement program (STIP)), § 450.322 (Development and content of the metropolitan transportation plan), and § 450.324 (Development and content of the transportation improvement program).

Several national and regional advocacy organizations, a few State DOTs and MPOs, some transit agencies and others suggested changes that go beyond what is required by statute. The FHWA and the FTA have adhered closely to the statutory language in drafting the regulation. Over time, and as necessary, the FHWA and the FTA will continue to issue additional guidance and disseminate information on noteworthy practices that may address these suggestions.

In response to several comments, specific regulatory reference to a Regional Transit Security Strategy (RTSS), including its definition, was removed due to the concern for possible disclosure of security-sensitive information in the planning process. Further, an RTSS is not required universally of all metropolitan areas and States. Regulatory language in both the metropolitan and statewide transportation planning sections was revised to make broad reference to the need for coordination with "appropriate" transit security-related plans, programs, and decision-making processes.

One national and regional professional, industry or advocacy organization suggested the incorporation of the Real Time System Management Information Program (required by § 1201 of the SAFETEA-LU) into the statewide transportation planning process. While the FHWA and the FTA agree that current, good quality data can improve effective transportation decisions and is key to effective operation and management strategies, we recognize each State's need to determine their appropriate statewide coordinated data collection program to support their individual planning process. We encourage the States to consider including real-time data, provided by the Real Time System Management Information Program, but have not included a requirement in this rule.

The FHWA and the FTA were asked to evaluate whether the leadership posts on MPO boards were acting in an impartial manner. A few organizations expressed concern that non-metropolitan or non-elected officials who serve as board chairs may have conflicts of interest that undermine local control of transportation funding. The FHWA and the FTA will consider conducting such a study as part of their discretionary research programs. Currently, we do not have enough information on this subject for incorporation into this rule.

Several documents providing research, data, and analysis on various issues related to transportation, planning and environment were submitted to the docket. The FHWA and the FTA have reviewed these documents and considered the information in developing this rule.

The FHWA and the FTA were asked to recognize regional planning organizations/regional transportation planning organizations (RPOs/RTPOs) throughout the rule as stakeholders and interested parties in the transportation planning process in States where they are established by law. Although the rule is silent on RPOs/RTPOs, § 450.208(a)(6) highlights that statewide transportation planning needs to coordinate with related planning activities being conducted outside of metropolitan planning areas. The FHWA and the FTA recognize that the RPO/RTPO planning process and activities should be input into the statewide transportation planning process. Further, many of the RPOs/RTPOs are recognized as forms of local government, and are addressed in § 420.210 (Interested parties, public involvement and consultation).

A few commenters observed that many small MPOs have very little funding from USDOT or non-USDOT sources, have very limited staffs, and limited consultant or technical support resources of their own. The FHWA and the FTA were urged to find ways to scale the regulatory requirements to fit the size and scope of smaller MPOs. We noted this comment and have tried to provide as much flexibility in the rule as practicable. We have provided some streamlined requirements for the non-transportation management area (TMA) MPOs, such as Simplified Statement of Work and grouping of projects within the transportation improvement program (TIP). The MPO is responsible for developing a planning process that is appropriate for its communities, given the resources and technical capability of the MPO.

Several State DOTs and a national and regional advocacy organization objected to including guidance documents with the regulations as Appendices A and B. These commenters noted that by including these documents with the regulation as appendices, the guidance documents would have the force and effect of law and, as a result, would "open up FHWA and FTA (and thus the States and MPOs) to litigation challenges based on a selective reading of short passages in these lengthy documents." Therefore, these commenters requested removal of the appendices. Additionally, these commenters were concerned that including these guidance documents with the regulation would make it more difficult to change these documents in response to evolving practices, as any change would require a rulemaking action.

The Office of the Federal Register, pursuant to the Federal Register Act (44 U.S.C. Chapter 15) has established criteria for publishing material in the **Federal Register** and the Code of Federal Regulations. Under these criteria, agencies may use an appendix to improve upon the quality or use of a regulation, but not to impose requirements or restrictions. Additionally, agencies may not use an appendix as a substitute for regulatory text. n1 The information the FHWA and the FTA proposed to include in appendices A and B is intended to be non-binding guidance. Therefore, we believe that State DOTs and MPOs would not be subject to increased litigation based on inclusion of these appendices.

n1 Federal Register Document Drafting Handbook, October 1998 Revision. National Archives and Records Administration, Office of the Federal Register. It is available at the following URL: *http://www.archives.gov/federal-register/write/handbook/ddh.pdf.*

We believe that Appendix A, Linking the Transportation Planning and NEPA Processes, provides explanatory information that amplifies the rule and does not add any additional requirements and would not be subject to many changes. Therefore, we have decided to keep Appendix A, but are adding a disclaimer to this effect in the introduction of Appendix A highlighting its non-binding status. In addition, we have made some minor changes to the text of Appendix A to ensure that it is consistent with the environmental streamlining requirements of § 6002 of the SAFETEA-LU.

As for Appendix B, Fiscal Constraint of Transportation Plans and Programs, the FHWA and the FTA agree with these commenters that modifications to this document may be more frequently required to respond to evolving practices. Therefore, the FHWA and the FTA have decided to remove Appendix [*7226] B from the rule. However, there are three elements within that appendix that the agencies believe should be a part of the regulatory text for clarity and completeness. These elements are: (1) Treatment of highway and transit operations and maintenance costs and revenues; (2) use of "year of expenditure dollars" in developing cost and revenue estimates; and (3) use of "cost ranges/cost bands" in the outer years of the metropolitan transportation plan. Please see the responses to the comments on Appendix B for additional background information and explanation. Consequently, we have included language in § 450.216 (Development and content of the statewide transportation improvement program (STIP)), § 450.322 (Development and content of the metropolitan transportation plan), and § 450.324 (Development and content of the transportation improvement program (TIP)) to address these issues within the regulation. The material contained in the proposed Appendix B will be made available as a guidance document on the agencies' Web sites.

Section-by-Section Discussion

The discussion in this section compares the NPRM with the final rule and discusses comments submitted on each section along with an explanation of any changes we made from the NPRM to the final rule. All references to revisions or changes are to changes in language that we originally proposed in the NPRM.

23 CFR Part 450

Subpart A--Transportation Planning and Programming Definitions

Section 450.100 Purpose

No comments were received on this section and no changes were made.

Section 450.102 Applicability

No comments were received on this section and no changes were made.

Section 450.104 Definitions

There were more than 45 documents with over 225 comments submitted on this section, with half of the documents coming from MPOs and almost one-fourth each from State DOTs and national and regional advocacy groups. Transit agencies, city/county agencies and the general public also commented on this section. Some of those that commented on this section recommended specific changes to examples or lists included in various definitions. It is important to note that the recommended lists in these definitions are intended to be advisory and not exhaustive; therefore, we did not make changes to the lists of examples.

Several definitions were revised based on comments received. These changes are described below.

Many State DOTs and MPOs as well as several national and regional advocacy organizations were concerned about the definitions of "administrative modification" and "amendment." Commenters requested greater distinction between the two terms.

Several of those that commented on this section requested that the words "minor revision" be included in the definition of "administrative modification." This change has been made. The examples in this definition have also been clarified, including "minor changes to project/project phase initiation dates." It is important to note that while an "administrative modification" can change the initiation date, it cannot affect the completion date of the project as modeled in the regional emissions analysis in nonattainment or maintenance areas. A change in the project/project phase completion date in a nonattainment or maintenance area would be considered an "amendment." Finally, based on comments, the term "not significant" was removed.

Commenters suggested that the term "amendment" include the words "major change" and use "major" in the examples. These changes have been made. State DOTs and MPOs should work with the FHWA and the FTA to identify thresholds for a "major" change in project cost. Examples of thresholds could include, but are not limited to, project cost increase that exceeds 20 percent of the total project cost; or project cost increase that exceeds a certain dollar amount, for example, the increase in costs exceeds the programmed amount by $ 50,000 or $ 100,000.

Further, some State DOTs and advocacy organizations wrote that changes in illustrative projects should not require an amendment. We agree. A sentence has been added to the definition of "amendment" to clarify this point. Also, most State DOTs that commented on this section noted that "amendment" should apply differently to long-range statewide transportation plans, since they are not subject to fiscal constraint. A sentence was added to the definition to clarify the long-range statewide transportation plan context.

After consultation with EPA, the definition of "attainment area" was revised to be consistent with the definition in the glossary of the Environmental Protection Agency's (EPA) Plain English Guide to the Clean Air Act. n2 We also included in this definition a clarification that a "maintenance area" is not considered an attainment area for transportation planning purposes.

n2 This document, "Plain English Guide to the Clean Air Act" is available via the Internet at the following URL: *http://www.epa.gov/air/oaqps/peg-caa/pegcaain.html.*

A few commenters expressed confusion about the definitions of "Available funds" and "Committed funds" as they relate to air quality conformity. We have simplified these definitions to remove the phrase "for projects or project phases in the first two years of a TIP and/or STIP in air quality nonattainment and maintenance areas." By deleting this phrase, however, we have not removed the requirement that projects in the first two years of a STIP and/or TIP in air quality nonattainment and maintenance areas be available or committed. This is still part of the definition under fiscal constraint. The requirement that these terms only apply to the first two years is already embedded in the regulation and does not need to be repeated in the definition of the terms "Available" and "Committed."

A national and regional advocacy organization and a few transit agencies suggested that "Full funding grant agreement" and "Project construction grant agreement" be added to the examples of "Committed funds." This change has been made. We also received a comment that the requirement for private funds to be in writing as part of "Committed funds" would limit private participation in transportation projects. The FHWA and the FTA find that a written commitment is necessary to ensure that the private funds ultimately are provided and is integral to the concept of "committed funds." This change was not made.

After consultation with the EPA, the definition of "conformity" was revised based on language from the EPA's conformity Web page n3 and in the EPA's conformity rule (*40 CFR 93.100*). n4

n3 EPA's conformity web page can be found at the following URL:
http://www.epa.gov/otaq/stateresources/transconf/index.htm.

n4 This document is available via the Internet at the following URL:
http://www.fhwa.dot.gov/environment/conformity/rule.htm.

Many MPOs wrote regarding the definition of "congestion management process" that the definition should reference Transportation System Management and Operations (TSMO), rather than "management and operation" to reinforce the principles of this emerging practice. The FHWA and the FTA do not believe this change would enhance the

definition and note [*7227] that the term "operations and management" is taken directly from statute. No change was made.

Many national and regional advocacy organizations and MPOs and COGs that commented on this section were concerned about the different uses of the term "consultation" in the definitions section and in Sections 450.214 (Development and content of the long-range statewide transportation plan) and 450.322 (Development and content of the metropolitan transportation plan). The definition of consultation used in § 450.214 (Development and content of the long-range statewide transportation plan) and § 450.322 (Development and content of the metropolitan transportation plan) is consistent with the definition in the statute found at *23 U.S.C. 134(i)(4)*, *23 U.S.C. 135(f)(2)*, *49 U.S.C. 5303(i)(4)*, and *49 U.S.C. 5304(f)(2)* and is applicable for those sections. This section presents a broad definition of "consultation" for use throughout the rest of the rule. We have added a note to the definition of "consultation" to recognize that this definition is not the one used in §§ 450.214 and 450.322.

Many national and regional advocacy organizations and several MPOs and COGs that commented on this section also asked that "periodically" be removed from the definition of "consultation" to better reflect that consideration of the other party's view and providing them with information should occur on a regular and ongoing basis, not a periodic basis. This definition is taken from the existing rule developed in an extensive rulemaking process in January 2003 on the non-metropolitan local official consultation process and agreed to by a number of stakeholders at that time *(68 FR 7419).* Further, the FHWA and the FTA consider "periodically" to mean frequently, on regular intervals. This change was not made.

Many transit agencies and State DOTs as well as several MPOs, COGs and others requested changes to the definition of "coordinated public transit-human services transportation plan" to reduce the degree of procedural detail. Accordingly, the definition was changed to be consistent with that used in the proposed FTA Circulars for implementing the *49 U.S.C. 5310*, *5316*, and *5317* programs (New Freedom Program Guidance, The Job Access And Reverse Commute (JARC) Program, Elderly Individuals And Individuals With Disabilities Program) published in the September 2006. n5 In addition, commenters proposed the addition of guidelines for preparing the coordinated public transit-human services transportation plan, including geographic scope, approval authority, and determination of lead agency. To ensure maximum flexibility for localities to tailor the coordinated public transit-human services transportation plan preparation process to their areas, we will disseminate non-regulatory guidance on optional approaches and examples of effective practice, along with training and technical assistance.

n5 These documents, "Elderly Individuals and Individuals With Disabilities, Job Access and Reverse Commute," and "New Freedom Programs: Coordinated Planning Guidance for FY 2007 and Proposed Circulars" were published September 6, 2006, and are available via the internet at the following URLs: *http://www.fta.dot.gov/publications/ publications-5607.html* or *http://a257.g.akamaitech.net/7/257/2422/01jan20061800/edocket.access.gpo.gov/2006/pdf/E6-14733.pdf.*

Several MPOs and COGs expressed concern about the definition of "coordination" because there is no resolution mechanism if agencies cannot come to agreement. The FHWA and the FTA support the development of a dispute resolution process for "coordination" and "consultation." However, such a process is not required by statute and is, therefore, not included in this rule. This does not preclude State DOTs and/or MPOs from developing their own dispute resolution processes as part of the transportation planning process.

After further review, the FHWA and the FTA have removed the term "exclusive" from the list of examples in the definition of "design concept." We do not want to imply that only "exclusive busways" can be identified as a type of project.

A proposal was offered to define the term "designated recipient" to clarify this term in the rule. This definition has been added to this section

Many State DOTs and some national and regional advocacy organizations that commented on the definition of "environmental mitigation activities" suggested deleting "rectify or reduce" from the definition because these terms are redundant. The FHWA and the FTA believe that the terms "rectify" and "reduce" are related more to the discussion of specific projects, not the broad planning context. We agree with this comment and have deleted these words. In addition, MPOs and COGs and a few State DOTs and others suggested simplifying the definition by removing statements of regulatory action. We agree and have deleted the last sentence of the definition which reiterated requirements in the body of the rule. Finally, we have modified the definition to be clear that strategies may not necessarily address potential project-level impacts.

Several major concerns were expressed regarding the definition for "Financially constrained or Fiscal constraint." Most commenters requested that three portions of the definition be deleted: (1) The phrase "by source," (2) the phrase "each program year," and (3) the phrase "while the existing system is adequately maintained and operated." The requirement for demonstrating fiscal constraint by year and by source is consistent with, and carries forth language in, the planning rule adopted in October 1993 *(58 FR 5804)*. The FHWA and the FTA consider demonstrating funding by year and by source necessary for decision-makers and the public to have confidence in the STIP and TIP as financially constrained. However, in response to concerns raised, we have changed the definition related to "by source" to be consistent with the October 1993 planning rule. This change clarifies that fiscal constraint documentation should include committed, available, or reasonably available revenue sources.

Additionally, as a result of the extensive comments provided on Appendix B (Fiscal constraint of transportation plans and programs) we have changed the phrase "while the existing system is adequately maintained and operated" to "with reasonable assurance that the federally supported transportation system is being adequately operated and maintained." We believe this change provides flexibility and addresses the commenters' concerns that the FHWA and the FTA were overreaching beyond the Federally supported transportation system. Please see the responses to the comments on Appendix B for additional background information and explanation. Finally, we have also clarified the definition to explicitly refer to "the metropolitan transportation plan, TIP and STIP."

Many State DOTs, a few national and regional advocacy organizations, and some MPOs and COGs wrote that the definition of "financial plans" should be changed to note that financial plans are not required for STIPs and are not required for illustrative projects. The FHWA and the FTA agree with both comments. We have added a note to the definition that financial plans are not required for STIPs. We also agree that financial plans are not required for illustrative projects. § 450.216(m) states that "The financial plan may include, for illustrative purposes, additional projects that would be included in the [*7228] adopted STIP if reasonable additional resources beyond those identified in the financial plan were available." We do not believe it is necessary to add a note to the definition regarding illustrative projects.

Several State DOTs also wrote requesting that the phrase "as well as operating and maintaining the entire transportation system" be removed from the definition of "financial plans." This change has been made

Proposals were offered to define the terms "full funding grant agreement" to clarify this term in the rule. This definition has been added to this section.

In response to comments regarding financial plans and fiscal constraint requirements, we have modified the definition of "illustrative project" to clarify that "illustrative projects" refer to additional transportation projects that would be included in financially constrained transportation plans and programs if "additional resources were to become available." This definition also notes that illustrative projects may (but are not required to) be included in the financial plan.

Representatives of a State DOT and a national and regional advocacy organization requested the inclusion of detailed methodologies for engaging private service providers in the transportation planning process, as well as standards for ascertaining compliance with private enterprise provisions and a complaint process. To ensure maximum flexibility for localities to tailor programs to the needs of private service providers in their areas, we will rely upon non-regulatory guidance, training, and technical assistance for disseminating information on optional approaches to private sector participation.

The FHWA and the FTA noted that the proposed rule used an incorrect Clean Air Act reference in the definition of "Maintenance area." This reference has been corrected.

After further review, the FHWA and the FTA have made slight changes to the definition of "management systems" to be more permissive. The phrase "and safety" was changed to "or safety" and "includes" was changed to "can include."

Some State DOTs and national and regional advocacy groups recommended removing the phrase "in the preceding program year" from the definition of "obligated projects." The FHWA and the FTA find that the phrase "in the preceding program year" is important in the context of the annual listing of obligated projects (See § 450.332 (Annual listing of obligated projects)) to clarify what projects should be included in the list, since TIPs cover multiple years. Therefore, this change was not made. However, we did change the definition to emphasize that funds need to be "authorized by the FHWA or awarded as a grant by the FTA."

Several State DOTs, MPOs and COGs and some national and regional advocacy organizations and transit agencies expressed confusion over the terms "management and operations" and "operations and management" as related to the

term they propose be included in the rule, "Transportation System Management and Operations (TSMO)." The SAFETEA-LU defined "Operational and Management Strategies" and its relationship to metropolitan long-range transportation plans. (*Operational and management strategies* means actions and strategies aimed at improving the performance of existing and planned transportation facilities to relieve vehicular congestion and maximizing the safety and mobility of people and goods (*23 U.S.C. 134(i)(2)(D)* and *49 U.S.C. 5303(i)(2)(D)*). This definition is included in the rule with one change. We have removed the modifier "vehicular" to emphasize that operational and management strategies should be considered for all modes. The FHWA and the FTA find this term, for practical purposes, to be the same as the term Transportation System Management and Operations currently commonly in use by agencies involved with transportation. We have chosen to continue using the term "operational and management strategies" as that is the term used in SAFETEA-LU.

Several State DOTs, MPOs and COGs and some national and regional advocacy organizations and transit agencies also asked for clarification of the term "operations and maintenance." The terms "operations" and "maintenance" are used in these regulations as defined in *23 U.S.C. 101*. Therefore, we have not repeated the definitions here.

A proposal was offered to define the term "project construction grant agreement" to clarify this term in the rule. This definition has been added to this section.

After further review, we have determined it is necessary to clarify the definition of "project selection" to emphasize these are procedures used by MPOs, States, and public transportation operators.

Based on comments, we have changed the term "business" in the definition of "provider of freight transportation services" to "entity." Freight transportation providers may include other concerns besides businesses.

A proposal was offered to define the term "public transportation operator" to clarify this term in the rule. This definition has been added to this section.

Several State DOTs and MPOs and COGs as well as some transit agencies and national and regional advocacy organizations noted that the definition of "regionally significant project" should not include a reference to "all capacity expanding projects." After consultation with the EPA, the FHWA and the FTA have changed this definition to be consistent with the EPA's transportation conformity rule (*40 CFR 93.101*).

Several of the State DOTs, many transit agencies, and a few of the national advocacy organizations and MPOs and COGs commented that the word "overarching" in the definition of "Regional Transit Security Strategies" was ambiguous. Other MPOs and COGs, transit agencies and national and regional advocacy organizations wrote that the definition was overly specific without defining who would be held responsible to develop the strategy and also expressed concern about possible disclosure of security-sensitive information in the planning process. Subsequent to publication of the NPRM, the FHWA and the FTA determined that the Department of Homeland Security does not require Regional Transit Security Strategies in all metropolitan areas, at all times. As a result, this term has been removed from this section and references to the term in § 450.208(h), § 450.214(e), and § 450.306(g) also have been removed from the rule. Alternatively, this language has been replaced, in these sections, with a reference to "other transit safety and security planning and review processes, plans, and programs, as appropriate."

The docket included several comments regarding the definitions for "revision," "amendment," "administrative modification," and "update." The definition of "revision" has been revised to use the terms "major" and "minor" rather than "significant" and "non-significant," consistent with the comments received and changes to the related terms.

A State DOT commented on the definition of "State implementation plan (SIP)." After consultation with EPA, this definition was revised to cite applicable sections of the Clear Air Act and to be consistent with the definition in the Clean Air Act and EPA's conformity rule (*40 CFR 93.101*) for "applicable implementation plan."

The docket included a comment requesting clarification of the term "staged" in the definition for [*7229] "Statewide transportation improvement program (STIP)." We have clarified this definition to describe the STIP as a "prioritized listing/program" and to reiterate that it must cover a period of four years. Similar changes were made to the definition of "Transportation improvement program (TIP)."

Some State DOTs and a national and regional advocacy organization suggested that the reference to "in order to meet the regular schedule as prescribed by Federal statute" be removed from the definition of "Update." A few MPOs and COGs questioned what would constitute an "update" and what was meant by "complete change." We agree with these concerns, have removed these phrases and revised and simplified this definition to "Update means making current

a long-range statewide transportation plan, metropolitan transportation plan, TIP, or STIP through a comprehensive review." Based on comments, we note in this definition that an "update" requires a 20-year horizon year for metropolitan transportation plans and long-range statewide transportation plans and a four-year program period for TIPs and STIPs.

Several MPOs and other organizations asked for clarification of the term "visualization." The FHWA and the FTA have changed "employed" to "used" in the "Visualization techniques" definition. Further, we agree that there is a need for more technical information on the use of visualization techniques and we intend to provide technical reports and guidance subsequent to the publication of this rule.

Proposals were offered to define the terms "advanced construction," "encouraged to," "intercity bus," "interested parties," "MPO staff," "public transportation provider," "reasonable access," "shall," and "should." The FHWA and the FTA believe these terms are generally well understood and do not require additional detail.

Subpart B--Statewide Transportation Planning and Programming

Section 450.200 Purpose

No comments were received on this section and no changes were made.

Section 450.202 Applicability

No comments were received on this section and no changes were made.

Section 450.204 Definitions

No comments were received on this section and no changes were made.

Section 450.206 Scope of the Statewide Transportation Planning Process

There were more than 20 separate comments on this section with the most coming from State DOTs, followed by national and regional advocacy organizations. A small number of comments came from MPOs and COGs and providers of public transportation.

In comments on this section and § 450.306 (Scope of the metropolitan transportation planning process), many MPOs and COGs, some national and regional advocacy organizations and a few State DOTs noted that paragraph (a)(3) embellished the statutory language for the "security" planning factor. Organizations that commented on this issue were concerned that the expanded language would require State DOTs and MPOs to go far beyond their traditional responsibilities in planning and developing transportation projects, which was not intended by the SAFETEA-LU. The FHWA and the FTA agree and have revised the language in paragraph (a)(3) to match the language in statute.

Most of the State DOTs and several of the national and regional advocacy organizations that commented on this section said that the text in paragraph (b) should be revised similar to the text in the October 1993 planning rule acknowledging that the degree of consideration will reflect the scale and complexity of issues within the State. The FHWA and the FTA agree with these comments and have revised the rule accordingly. We have adopted the October 1993 planning rule language with one change. The phrase "transportation problems" was changed to "transportation systems development."

After further review, we have clarified paragraph (c) to be more specific and to mirror the language in *23 U.S.C. 135(d)(2)* and *49 U.S.C. 5304(d)(2)*. The paragraph now specifically refers to "any court under *title 23 U.S.C., 49* U.S.C. Chapter 53, subchapter II of title 5 U.S.C. Chapter 5, or title 5 U.S.C. Chapter 7" and to the "statewide transportation" planning process finding.

A small number of national and regional advocacy organizations and State DOTs that commented on this section said they would like the FHWA and the FTA to develop and/or encourage the use of performance measures when State DOTs consider the planning factors listed in this section. While the FHWA and the FTA encourage the use of performance measures, the flexibility afforded the State DOTs and MPOs in implementing the transportation planning process gives them wide latitude to develop a process that is appropriate for their jurisdiction. We believe this issue is best addressed in guidance and technical assistance.

Section 450.208 Coordination of Planning Process Activities

There were almost 100 separate comments on this section mostly from State DOTs, followed by national and regional advocacy organizations. A number of comments came from MPOs and COGs with a small number from public transportation providers or Federal agencies.

In some of the comments from national and regional advocacy organizations, MPOs and COGs, and others, the FHWA and the FTA were asked to expand the scope of the transportation planning process to include a variety of other issues and concerns. In response to these comments, we have added "at a minimum" to paragraph (a) to emphasize the flexibility for State DOTs to include more in their statewide transportation planning process than is listed in this section.

Several MPOs and COGs that had comments on this section suggested clarification of paragraph (a)(1) regarding the State's use of information and studies provided by MPOs. The text from this paragraph in part carries forward but simplifies text from *23 CFR 450.210* of the October 1993 planning rule. The FHWA and the FTA find that the language provides reasonable flexibility to respond to different circumstances while reinforcing the importance of information and technical studies as a foundation in transportation planning. No changes were made to this paragraph.

Many of the State DOTs that commented on this section indicated that coordination referenced in paragraph (a)(2) should not extend to private businesses. At the same time, many of the MPOs, COGs and national and regional advocacy organizations, as well as a public transportation provider that commented on this section wrote in support of the section and some requested that "consult" replace "coordinate."

The requirements in this paragraph come from the statutory language; therefore, no change was made. The FHWA and the FTA want to provide State DOTs flexibility to determine how to coordinate with statewide trade and economic planning activities and the level or coordination that needs to take place within the planning process. The [*7230] FHWA has made available information related to Public-Private Partnership opportunities, including analyses of contractual agreements formed between public agencies and private sector entities, on its Web site at: *http://www.fhwa.dot.gov/ppp/*. If necessary, we will provide guidance subsequent to the rule if more clarity is needed regarding this coordination.

Many of the State DOTs that commented on this section said that coordination in paragraph (a)(3) exceeds the requirement in the statute. At the same time, several of the national and regional advocacy organizations and a Federal agency commented in support of the language in the proposed rule. The FHWA and the FTA find that the proposed language does exceed the intent of the statute, and have revised the rule to more closely reflect the statutory language, by changing "coordinate planning" to "consider the concerns of."

Many of the State DOTs that commented on this section suggested placing the word "affected" before "local elected officials" in paragraph (a)(4). At the same time, some of the MPOs and COGs and national and regional advocacy organizations that provided comments on this section suggested changing "consider" to "consult," which is used in § 450.210 (Interested parties, public involvement, and consultation). The text follows the statutory language. The FHWA and the FTA considered both groups of comments and determined that using the statutory language for this paragraph without amplification best meets the intent of the statute.

Many of the State DOTs that commented on this section said that the text in paragraph (a)(6) should follow the statutory language (*23 U.S.C. 135(e)(1)(3)* and *49 U.S.C. 5304(e)(1)(3)*). The FHWA and the FTA agree and revised the rule accordingly.

Several of the State DOTs that commented on this section objected to the phrase "establish a forum" in paragraph (a)(7), while a smaller number supported the text. The FHWA and the FTA want to emphasize the importance of information and technical studies as a foundation in transportation planning. While there is no statutory basis to require "establish[ing] a forum," this paragraph has been revised to more closely reflect the intent from § 450.210(a)(1) and (a)(3) of the October 1993 rule regarding coordination of data collection and analyses with MPOs and public transportation operators.

After further review, the FHWA and the FTA have modified the last sentence of paragraph (c) to be consistent with *23 U.S.C. 135(c)(2)* and *49 U.S.C. 5304(c)(2)* regarding multistate agreements and compacts.

Many of the State DOTs and a few of the national and regional advocacy organizations that provided comments on this section said the text in paragraphs (e) and (f) went beyond statutory requirements. The FHWA and the FTA agree

with these comments and revised the rule accordingly by changing "are encouraged to" to "may" in paragraph (e) and adding "to the maximum extent practicable" to paragraph (f).

Most transit agencies, several State DOTs, MPOs, COGs, and others that commented on this section expressed concern or confusion about the requirement in paragraph (g) for the statewide transportation planning process to be consistent with the development of coordinated public transit-human services transportation plans. Several commenters requested the addition of procedural detail on the coordinated public transit-human services transportation plan, including geographic scope, approval authority, and determination of lead agency. Some commenters recommended removing the requirement entirely. We also received a comment questioning whether metropolitan and statewide transportation planning processes should be consistent with the coordinated public transit-human services transportation plan, or vice versa.

To ensure maximum flexibility for localities to undertake a coordinated planning process that may be uniquely tailored to their area, we have not included additional detailed requirements in the rule. The FHWA and the FTA will disseminate non-regulatory guidance, complemented by a wide array of effective practice case studies and supported by training and technical assistance, on the coordinated public transit-human services transportation plan. The definition of the coordinated public transit-human services transportation plan was changed to be consistent with that used in the proposed FTA Circulars for implementing the *49 U.S.C. 5310, 5316,* and *5317* programs (New Freedom Program Guidance And Application Instructions, The Job Access And Reverse Commute (JARC) Program Guidance And Application Instructions, Elderly Individuals And Individuals With Disabilities Program Guidance And Application Instructions) respectively, published on September 6, 2006. n6 Additionally, provisions for promoting consistency between the planning processes were revised to clarify that the coordinated public transit-human services transportation plan should be prepared in full coordination and be consistent with the metropolitan transportation planning process. The revisions also are intended to add flexibility in how the coordinated transportation plans would be prepared.

n6 These documents, "Elderly Individuals and Individuals With Disabilities, Job Access and Reverse Commute," and "New Freedom Programs: Coordinated Planning Guidance for FY 2007 and Proposed Circulars" were published September 6, 2006, and are available via the internet at the following URL: *http://www.fta.dot.gov/ publications/publications-5607.html.*

Many of the State DOTs, several transit agencies, and a few of the national and regional advocacy organizations that provided comments on this section, said the text in paragraph (h) went beyond statutory requirements. Several transit agencies and a few State DOTs and others suggested deleting paragraph (h) due to the confidential nature of Regional Transit Security Strategies (RTSS). An RTSS is not required of all metropolitan areas and States across the U.S. Reference to the RTSS was removed from paragraph (h). Instead, we have added a reference to "other transit safety and security planning and review processes, plans, and programs, as appropriate."

Section 450.210 Interested Parties, Public Involvement, and Consultation

The docket included 33 documents that contained about 60 comments on this section, with many from State DOTs, national and regional advocacy organizations and MPOs and COGs.

Many of the State DOTs and some of the national and regional advocacy organizations said that State DOTs should not be required to document the public involvement process. The FHWA and the FTA find that an essential element of an effective public involvement process is the opportunity for the public to understand when, how, and where public comment can occur. It is important to open, effective public involvement that the process be documented and available for public review. Therefore, we have retained the requirement for a documented public involvement process.

Some of the MPOs and some of the national and regional advocacy organizations said they would like to expand the list of interested parties in paragraph (a)(1)(i). Representatives of private bus operators requested specific mention in the regulation. [*7231]

The list of interested parties in the regulation is consistent with *23 U.S.C. 135(f)(3)(A)* and *49 U.S.C. 5304(f)(3)(A),* as amended by the SAFETEA-LU, and is sufficiently broad to encompass and have relevance to all of the suggested additional parties. The list illustrates groups that typically have an interest in statewide transportation planning, but does not preclude States from providing information about transportation planning to other types of individuals or organizations. The FHWA and the FTA note that *49 U.S.C. 5307(c)* requires grant recipients to make available to the public information on the proposed program of projects and associated funding.

Specifically in regard to MPOs, States shall coordinate with MPOs under § 450.208 (Coordination of planning process activities). Therefore, a reference to MPOs here would be redundant and potentially confusing since this section does not require coordination with interested parties. No change was made to add MPOs to this paragraph.

Many of the State DOTs and some of the national and regional advocacy organizations also said that State DOTs should not be required to document the non-metropolitan local official consultation process. The rule does not change the regulations published in the **Federal Register** on January 23 *(68 FR 3176)* and February 14, 2003 *(68 FR 7418)* regarding consultation with non-metropolitan local officials. Those regulations were developed based on significant review and comment by State DOTs and non-metropolitan local officials and their representatives. At that time most State DOTs and national and regional advocacy organizations supported the regulations. Therefore, the only change we have made to paragraph (b) is to change "revisions" to "changes," since "revision" is now specifically defined in the rule and, by that definition, is not an appropriate term for this paragraph.

Some of the State DOTs and some national and regional advocacy organizations said that the text encouraging State DOTs to document their process for consulting with Indian Tribal Governments should be eliminated. The commenters believe that documenting this consultation process goes beyond requirements in statute. We disagree. The FHWA and the FTA support efforts to consult with Indian Tribal governments and find that documentation of consultation processes are essential to a party's ability to understand when, how, and where the party can be involved. Upon further consideration, to strengthen the involvement of Indian Tribal governments in the statewide transportation planning process, we have changed paragraph (c) from "States are encouraged to" to "States shall, to the extent practicable."

Section 450.212 Transportation Planning Studies and Project Development

Section 1308 of the TEA-21 required the Secretary to eliminate the major investment study (MIS) set forth in *§ 450.318 of title 23, Code of Federal R*egulations, as a separate requirement, and promulgate regulations to integrate such requirement, as appropriate, as part of the analysis required to be undertaken pursuant to the planning provisions of title 23 U.S.C. and title 49 U.S.C. Chapter 53 and the National Environmental Policy Act of 1969 (NEPA) for Federal-aid highway and transit projects. The purpose of this section and § 450.318 (Transportation planning studies and project development) is to implement this requirement of Section 1308 of the TEA-21 and eliminate the MIS as a stand-alone requirement. A phrase has been added to paragraph (a) to clarify the purpose of this section.

The docket included more than 20 documents that contained more than 50 comments on this section with about two-thirds from State DOTs and the rest from MPOs or COGs, and national and regional advocacy organizations. The comments on this section were similar to, and often referenced, the comments on § 450.318 (Transportation planning studies and project development).

Most of the comments received supported the concept of linking planning and NEPA but opposed including Appendix A in the rule. The purpose of an Appendix to a regulation is to improve the quality or use of a rule, without imposing new requirements or restrictions. Appendices provide supplemental, background or explanatory information that illustrates or amplifies a rule. Because Appendix A provides amplifying information about how State DOTs, MPOs and public transportation operators can choose to conduct transportation planning-level choices and analyses so they may be adopted or incorporated into the process required by NEPA, but does not impose new requirements, the FHWA and the FTA find that Appendix A is useful information to be included in support of this and other sections of the rule. A phrase has been added to paragraph (c) to clarify this point. Additionally, we have added disclaimer language at the introduction of Appendix A.

The FHWA and the FTA recognize commenters' concerns about Appendix A, including the recommendation that this information be kept as guidance rather than be made a part of the rule. First, information in an Appendix to a regulation does not carry regulatory authority in itself, but rather serves as guidance to further explain the regulation. Secondly, as stated above, Section 1308 of TEA-21 required the Secretary to eliminate the MIS as a separate requirement, and promulgate regulations to integrate such requirement, as appropriate, as part of the transportation planning process. Appendix A fulfills that Congressional direction by providing explanatory information regarding how the MIS requirement can be integrated into the transportation planning process. Inclusion of this explanatory information as an Appendix to the regulation will make the information more readily available to users of the regulation, and will provide notice to all interested persons of the agencies' official guidance on MIS integration with the planning process. Attachment of Appendix A to this rule will provide convenient reference for State DOTs, MPOs and public transportation operator(s) who choose to incorporate planning results and decisions in the NEPA process. It will also make the information readily available to the public. Additionally, the FHWA and the FTA will work with Federal environmental, regulatory, and

resource agencies to incorporate the principles of Appendix A in their day-to-day NEPA policies and procedures related to their involvement in highway and transit projects. For the reasons stated above, after careful consideration of all comments, the FHWA and the FTA have decided to attach Appendix A to the final rule as proposed in the NPRM.

Most State DOTs and several MPOs and COGs, and national and regional advocacy organizations that commented on this section were concerned that the language in paragraph (a) is too restrictive. The FHWA and the FTA agree that planning studies need not "meet the requirements of NEPA" to be incorporated into NEPA documents. Instead, we have changed the language in paragraph (a) to "consistent with" NEPA. In addition, we have added the phrase "multimodal, systems-level" before "corridor or subarea" to emphasize the "planning" venue for environmental consideration.

Commenters on this section also requested that the rule clarify that the State DOT has the responsibility for conducting corridor or subarea studies in the statewide transportation planning [*7232] process. The FHWA and the FTA recognize that the State DOT is responsible for the statewide transportation planning process. However, we do not want to preclude MPOs or public transportation operators, in consultation or jointly with the State DOT, from conducting corridor or subarea studies. Therefore, we have changed paragraph (a) to add the sentence "To the extent practicable, development of these transportation planning studies shall involve consultation with, or joint efforts among, the State(s), MPO(s), and/or public transportation operator(s)."

Some State DOTs suggested incorporating planning decisions rather than documents into the NEPA process. The FHWA and the FTA find that decisions made as part of the planning studies may be used as part of the overall project development process and have changed paragraph (a) to include the word "decisions" as well as "results." It is important to note, however, that a decision made during the transportation planning process should be presented in a documented study or other source materials to be included in the project development process. Documented studies or other source materials may be incorporated directly or by reference into NEPA documents, as noted in § 450.212(b). We have added "or other source material" to paragraph (b) to recognize source materials other than planning studies may be used as part of the overall project development process.

It is important to note that this section does not require NEPA-level evaluation in the transportation planning process. Planning studies need to be of sufficient disclosure and embrace the principles of NEPA so as to provide a strong foundation for the inclusion of planning decisions in the NEPA process. The FHWA and the FTA also reiterate the voluntary nature of this section and the amplifying information in Appendix A. States, transit operators and/or MPOs may choose to undertake studies which may be used in the NEPA process, but are not required to do so.

Several State DOTs and national and regional advocacy organizations were concerned about the identification and discussion of environmental mitigation. They did not believe that detail on environmental mitigation activities was appropriate in the transportation planning process. The FHWA and the FTA agree. Paragraph (a)(5) calls for "preliminary identification of environmental impacts and environmental mitigation." The FHWA and the FTA believe that the term "preliminary" adequately indicates that State DOTs are not expected to provide the same level of detail on impacts and mitigation as would be expected during the NEPA process.

Based on comments on Appendix A, we added the phrase "directly or" in paragraph (b), to indicate the use of publicly available planning documents for subsequent NEPA documents.

Also based on comments on Appendix A, we added the phrase "systems-level" in paragraph (b)(2), to emphasize that these corridor or subarea studies are conducted during the planning process at a broader scale than project specific studies under NEPA.

Several State DOTs and many others who submitted comments on this section noted that the word "continual" in paragraph (b)(2)(iii) provides the public with more opportunity to comment than is necessary. We agree and have replaced "continual" with "reasonable" in this paragraph, consistent with the terminology in § 450.316(a) (Interested parties, participation and consultation). Also in paragraph (b)(2)(iii) a number of commenters noted that the paragraph references the metropolitan transportation planning process when it should reference the statewide transportation planning process. This change has been made.

Several State DOTs and a national and regional advocacy organization suggested adding a "savings clause" in a new paragraph. A savings clause would lessen the likelihood that the new provisions regarding corridor or subarea studies would have unintended consequences. The specific elements requested to be included in the "savings clause" were statements that: (a) The corridor and subarea studies are voluntary; (b) corridor and subarea studies can be incorporated into the NEPA process even if they are not specifically mentioned in the long-range statewide transportation plan; (c) corridor and subarea studies are not the sole means for linking planning and NEPA; and (d) reiterate the statutory prohi-

bition on applying NEPA requirements to the transportation planning process. The concepts recommended in the "savings clause" all reiterate provisions found elsewhere in the rule or statute. The FHWA and the FTA do not agree that it is necessary to repeat those provisions in this section.

The docket included a comment that corridor or subarea studies should be required, not voluntary, to be included in NEPA studies. Given the opposition to requiring NEPA-level analysis in the transportation planning process, the FHWA and the FTA find that the permissive nature of this section and Appendix A strikes the appropriate balance.

The docket also included a question asking what needs to be included in an agreement with the NEPA lead agencies to accomplish this integration. The FHWA and the FTA have determined that identification of what information appropriately belongs in the agreement should be disseminated as non-regulatory guidance, complemented by a wide array of effective practice case studies and supported by training and technical assistance. No change was made to the rule. We have not required that corridor or subarea studies be included or incorporated into NEPA studies.

Section 450.214 Development and Content of the Long-Range Statewide Transportation Plan

The docket included approximately 50 documents that contained about 50 comments on this section with about one-third from State DOTs, one-half from national and regional advocacy organizations, and the rest from MPOs and COGs, city/county/State agencies, general public and transit agencies.

Many comments were received regarding the comparison of transportation plans with conservation plans. According to statute (*23 U.S.C. 135(f)(2)(D)* and *49 U.S.C. 5304(f)(2)(D)*), for long-range statewide transportation plans, comparison must be made to both conservation plans and inventories of natural/historic resources; whereas language relating to metropolitan transportation plans (*23 U.S.C. 134(i)(4)(B)* and *49 U.S.C. 5303(i)(4)(B)*) requires comparison to State conservation plans/maps or comparison to inventories of natural or historic resources. The rule language is consistent with what is in statute. Therefore, no changes were made to the rule language.

A few comments were received pertaining to the lack of a required financial plan for the long-range statewide transportation plan. Most of the MPOs and COGs and several of the national and regional advocacy organizations were in favor of adding this requirement. One State DOT voiced opinion that this should remain an option, but not be mandated.

The FHWA and the FTA agree that the long-range statewide transportation plan may include a financial plan. This optional financial plan is different from the fiscal constraint requirement for the STIP. This financial plan is a broad look at the future revenue forecast and strategies needed to fund future projects over a 20-year horizon. However, the [*7233] SAFETEA-LU made it clear that the financial plan should not be required for a long-range statewide transportation plan. Therefore, no change was made to the rule.

A few comments were received stating that the 20-year horizon for the long-range statewide transportation plan should only be required as of the effective date of the plan adoption, which would be similar to language used for the effective date of the metropolitan transportation plan. The FWHA and the FTA agree with this comment and have added "at the time of adoption" to paragraph (a).

DOT Congestion Initiative: On May 16, 2006, the U.S. Secretary of Transportation announced a national initiative to address congestion related to highway, freight and aviation. The intent of the "National Strategy to Reduce Congestion on America's Transportation Network" n7 is to provide a blueprint for Federal, State and local officials to tackle congestion. The States and MPO(s) are encouraged to seek Urban Partnership Agreements with a handful of communities willing to demonstrate new congestion relief strategies and encourages States to pass legislation giving the private sector a broader opportunity to invest in transportation. It calls for more widespread deployment of new operational technologies and practices that end traffic tie ups, designates new interstate "corridors of the future," targets port and border congestion, and expands aviation capacity.

n7 This document, "An Overview of the National Strategy to Reduce Congestion on America's Transportation Network" dated May, 2006, is available via the internet at the following URL: *http://www.fightgridlocknow.gov.*

U.S. DOT encourages the State DOTs and MPOs to consider and implement strategies, specifically related to highway and transit operations and expansion, freight, transportation pricing, other vehicle-based charges techniques, etc. The mechanism that the State DOTs and MPOs employ to explore these strategies is within their discretion. The U.S. DOT will focus its resources, funding, staff and technology to cut traffic jams and relieve freight bottlenecks.

To encourage States to address congestion in the long-range statewide transportation plan, the following sentence was added to paragraph (b): "The long-range statewide transportation plan may consider projects and strategies that address areas or corridors where current or projected congestion threatens the efficient functioning of key elements of the State's transportation system."

Several comments were received stating that the security requirements of paragraph (e) go beyond what was intended in the SAFETEA-LU. Based on these comments, the concern for possible disclosure of security-sensitive information in the planning process and the determination that a Regional Transit Security Study is not required universally of all metropolitan areas and States, this reference has been removed from the rule and instead we have added a reference to "other transit safety and security planning and review processes, plans, and programs, as appropriate." Several commenters also were concerned about the distinction between "homeland" and "personal" security in the planning factors found at § 450.206 (Scope of the statewide transportation planning process). This distinction has been removed from § 450.206 (Scope of the statewide transportation planning process) and § 450.306 (Scope of the metropolitan transportation planning process).

Some State DOTs and a few advocacy organizations commented that "types of" should be added to the discussion of potential environmental mitigation activities requirement in paragraph (j) to emphasize the policy or strategic nature of these discussions. The rule language is consistent with statute (*23 U.S.C. 135(f)(4)* and *49 U.S.C. 5304(f)(4)*), therefore this change was not made. However, we have added a sentence to this paragraph recognizing that long-range statewide transportation plans may focus on "policies, programs, or strategies, rather than at the project level." The last sentence of this paragraph was also deleted because Appendix A does not provide additional information relevant to the subject of this paragraph.

In paragraph (l), in response to comments from State DOTs, national and regional advocacy organizations and several others, we have added the phrase "but is not required to." The purpose of this addition is to reinforce that the financial plan is not required to include illustrative projects. We also corrected the language in the last sentence: "were available" was changed to "were to become available."

Several State DOTs and a few national and regional advocacy organizations requested in regard to paragraph (p) that long-range statewide transportation plans be provided to the FHWA and the FTA only when "amended" not "revised." We agree and have made this change.

Section 450.216 Development and Content of the Statewide Transportation Improvement Program (STIP)

The FHWA and the FTA received over 100 separate comments on this section with the most from State DOTs followed by national and regional advocacy organizations. MPOs and COGs, local governments and public transportation providers also provided comments on this section.

Several State DOTs and national and regional advocacy organizations and a few MPOs and COGs said in regards to paragraph (a) that State DOTs should be allowed to have a statewide transportation improvement program (STIP) of more than four years where the additional year(s) are not illustrative.

The four-year scope is consistent with the time period required by the SAFETEA-LU. While State DOTs are not prohibited from developing STIPs covering a longer time period, in accordance with statute, the FHWA and the FTA can only recognize and take subsequent action on projects included in the first four years of the STIP. State DOTs may show projects as illustrative after the first four years, as well as in the long-range statewide transportation plan. Therefore, no change was made to this section of the rule.

After consultation with EPA and in response to comments from a few national and regional advocacy organizations, the language in paragraph (b) has been changed to clarify that projects in the "donut areas" of a nonattainment or maintenance area must be included in the regional emissions analysis that supported the conformity determination of the associated metropolitan TIP before they are added to the STIP. The transportation conformity rule (40 CFR part 93) covers the requirements for including projects in the "donut area" in the regional emissions analysis.

A public transportation provider said in regard to paragraph (g) that security projects should be added to the list of projects exempted from listing in the STIP. Because security projects are often funded with title 49 U.S.C. Chapter 53 or title 23 U.S.C. funds, they must be included in the STIP. No change was made to this paragraph.

However, after further review, the FHWA and the FTA have determined it is appropriate to remove the phrase "federally supported" from the beginning of paragraph (g) because it is redundant. The paragraph already requires pro-

jects to be included if they are funded under title 23 U.S.C. and title 49 U.S.C. Chapter 53. We have also changed paragraph (g) to allow the [*7234] inclusion of the exempted projects, but do not require that they be included. Further, we have added "Safety projects funded under *23 U.S.C. 402*" to paragraph (g)(1) to be consistent with the October 1993 planning rule.

When proposing Appendix B to the rule, the FHWA and the FTA intended to raise the level of awareness and importance in developing fiscally constrained transportation plans, TIPs, and STIPs to States, MPOs, and public transportation operators. Since its introduction under the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) (Pub. L. 102-240), fiscal constraint has remained a prominent aspect of transportation plan and program development, carrying through to the TEA-21 and now to the SAFETEA-LU. The FHWA and the FTA acknowledge that Appendix B contains a combination of guidance, amplifying information and additional criteria. Given the level of controversy regarding Appendix B, it has been removed from the rule. Therefore, the sentence referencing Appendix B in paragraph (l) has been deleted.

Many State DOTs and several national and regional advocacy organizations commented in regard to paragraph (h), that they should not have to demonstrate financial constraint for projects included in the STIP funded with non-FHWA and non-FTA funds. However, this requirement is consistent with and carries forward the requirement that was implemented with the October 1993 planning rule. In addition, for informational purposes and air quality analysis in nonattainment and maintenance areas, regionally significant non-Federal projects shall be included in the STIP. Therefore, the FHWA and the FTA have retained this portion of paragraph (h). We have, however, simplified the paragraph slightly to combine the last two sentences.

Most State DOTs and national and regional advocacy organizations that commented on this section, recommended in regards to paragraph (i) that after the first year of the STIP, only the "likely" or "possible" (rather than "proposed") categories of funds should be identified by source and year. The FHWA and the FTA agree with this suggestion, with the exception of projects in nonattainment and maintenance areas for which funding in the first two years must be available or committed. Paragraph (i)(3) has been changed to specifically reference the amount of "Federal funds" proposed to be obligated and to identify separate standards for the first year and for the subsequent years of the STIP.

One of the features of Appendix B that the FHWA and the FTA find merits inclusion in the rule is "year of expenditure dollars." The following has been added to paragraph (l): "Revenue and cost estimates for the STIP must use an inflation rate(s) to reflect 'year of expenditure dollars,' based on reasonable financial principles and information, developed cooperatively by the State, MPOs, and public transportation operators." This language expresses the desire of the FHWA and the FTA for revenue and cost estimates to be reflected in "year of expenditure dollars." We recognize that it might take some time for State DOTs and MPOs to convert their metropolitan transportation plans, STIPs and TIPs to reflect this requirement. Therefore, we will allow a grace period until December 11, 2007, during which time State DOTs and MPOs may reflect revenue and cost estimates in "constant dollars." After December 11, 2007, revenues and cost estimates must use "year of expenditure" dollars. This requirement is consistent with the January 27, 2006, document "Interim FHWA Major Project Guidance." n8 Please see the responses to the comments on Appendix B to the NPRM for additional background information and explanation. In addition, to reinforce that the financial plan is not required to include illustrative projects, we have added the phrase "but is not required to" to this paragraph. Finally, we have deleted the reference to Appendix B in this paragraph because Appendix B is not included as part of this rule.

n8 This document, "Interim FHWA Major Project Guidance," dated January 27, 2006, is available via the internet at the following URL: *http://www.fhwa.dot.gov/programadmin/mega/012706.cfm.*

Regarding paragraph (m), many State DOTs, national and regional advocacy organizations and a few MPOs and COGs questioned having to demonstrate their ability to adequately operate and maintain the entire transportation system. The FHWA and the FTA have revised paragraph (m) to delete the phrase "while the entire transportation system is being adequately operated and maintained." Instead, we have added "while federally-supported facilities are being adequately operated and maintained." Further, as discussed in the response to the comments on Appendix B, we have added to this paragraph: "For purposes of transportation operations and maintenance, the STIP shall include financial information containing system-level estimates of costs and revenue sources reasonably expected to be available to adequately operate and maintain Federal-aid highways (as defined by *23 U.S.C. 101(a)(5)*) and public transportation (as defined by title 49 U.S.C. Chapter 53)."

Many State DOTs and several national and regional advocacy organizations said regarding paragraph (m) that State DOTs should not have to demonstrate financial constraint in the STIP by year or by source of funding. Based on nearly 13 years of implementing this requirement, the FHWA and the FTA consider demonstrating funding by year necessary

for decision-makers and the public to have confidence in the STIP as financially constrained. This change was not made. The specific reference to "by source" has been removed. However, the requirement for State DOTs to identify strategies for ensuring the availability of any proposed funding sources is retained. Please see the responses to the comments on Appendix B for additional background information and explanation as to why we have included this language in § 450.216.

After further review, the FHWA and the FTA determined that paragraph (n) is redundant. The same information is included in paragraph (b). Therefore, paragraph (n) was removed.

One State DOT and one local agency said that the regulation should include language emphasizing and expanding bicycle and pedestrian program guidance. The FHWA and the FTA find that the language in the guidance documents issued by the FHWA and the FTA on February 6, 2006, n9 is sufficient to address bicycle and pedestrian needs without being raised to the level of regulatory language.

n9 The guidance memo entitled "Flexible Funding for Highway and Transit and Funding for Bicycle and Pedestrian Programs," dated February 6, 2006, is available via the internet at the following URL: *http://www.fhwa.dot.gov/hep/flexfund.htm.*

Many State DOTs and national and regional advocacy organizations that provided comments on this section said in regards to paragraph (o) (now paragraph (n)), that all changes that affect fiscal constraint should not require an amendment. We have slightly modified the paragraph to remove "all" from the last sentence, but note that this change does not remove the requirement that any change that affects fiscal constraint requires an amendment. By definition, an amendment is "a revision that requires public review and comment, redemonstration of fiscal constraint, or a conformity determination (for 'non-exempt' projects in nonattainment and maintenance areas). (See § 450.104 (Definitions)). [*7235]

The FHWA and the FTA note that nearly all comments on § 450.324 (Development and content of the transportation improvement program (TIP)) regarding the question posed in the preamble of the NPRM "whether the FHWA and the FTA should require MPOs submitting TIP amendments to demonstrate that funds are 'available or committed' for projects identified in the TIP in the year the TIP amendment is submitted and the following year" opposed a change. Almost all commenters mentioned that such a change would require reviewing the financial assumptions for the entire program, thereby causing an undue burden. Commenters suggested showing financial constraint only for the incremental change. The same question was posed in this section of the NPRM. Although commenters did not respond to the question in comments on this section, based on the comments on § 450.324 no change was made to the rule. However, the FHWA and the FTA are concerned for the potential impact of individual amendments on the funding commitments and schedules for the other projects in the STIP. For this reason, the financial constraint determination occasioned by the STIP amendment will necessitate review of all projects and revenue sources in the STIP. The FHWA and the FTA will address any concerns on this issue through subsequent guidance.

Many State DOTs, MPOs and COGs as well as some national and regional advocacy organizations and a few public transportation providers and local government agencies asked for clarification on fiscal constraint if the financial situation in the State or metropolitan region changes. The FHWA and the FTA have added a new paragraph (o) to clarify that where a revenue source is removed or substantially reduced after the FHWA and the FTA find a STIP to be fiscally constrained, the FHWA and the FTA will not withdraw its determination of fiscal constraint but that the FHWA and the FTA will not act on an updated or amended STIP which does not reflect the changed revenue situation.

Section 450.218 Self-Certification, Federal Findings, and Federal Approvals

The docket included about 20 documents that contained approximately 30 comments on this section with about one-half from State DOTs, one-quarter from national and regional advocacy organizations, and the rest from MPOs and COGs, and city/county governments.

Several comments were made under this section that should have referenced 450.220(e) and the question posed in the preamble to the NPRM "whether States should be required to prepare an 'agreed to' list of projects at the beginning of each of the four years in the STIP, rather than only the first year and whether a STIP amendment should be required to move projects between years in the STIP if an 'agreed to' list is required for each year." These comments have been reflected in the discussion of and final language for § 450.220(e).

Many commenters, including almost all State DOTs, in regards to paragraph (a), asserted their belief that the October 1993 planning rule requires joint FHWA and FTA approval of STIP amendments only "as necessary" so that, in most cases, either the FHWA or the FTA could approve the amendment. This is not the case. The October 1993 plan-

ning rule at *23 CFR 450.220(a)* did require joint approval for all new STIPs and STIP amendments "as necessary." The FHWA and the FTA have reviewed this requirement and determined that joint approval remains necessary. However, we note that through the internal Planning Collaboration Initiative, the FHWA and the FTA have developed a number of streamlined internal processes and agreements to expedite review and approval of STIP amendments. Based on these agreements and experience with the current regulation, we do not believe requiring joint approval will slow down the approval process or impose new workloads on the FHWA and the FTA. Joint approval of STIP amendments is necessary as part of our stewardship and oversight responsibility.

We have clarified paragraph (a) to specifically state that "STIP amendments shall also be submitted to the FHWA and the FTA for joint approval" and that "at the time the entire STIP or STIP amendment is submitted," the State shall certify the planning process is being carried out in accordance with requirements.

After further review of this section, the FHWA and the FTA have updated the list of applicable requirements in paragraph (a). Reference to "23 CFR parts 200 and 300 have been removed" from paragraph (a)(2). Instead, a more specific reference to "23 CFR part 230, regarding implementation of an equal employment opportunity program on Federal and Federal-aid highway construction contracts" was added as paragraph (a)(5). This is the specific portion of 23 CFR parts 200 and 300 that needs to be reviewed and is not related to Title VI of the Civil Rights Act of 1964 in paragraph (a)(2). In addition, we have added a new paragraph (a)(3) "*49 U.S.C. 5332*, prohibiting discrimination on the basis of race, color, creed, national origin, sex, or age in employment or business opportunity." Upon further review of this section, the FHWA and the FTA determined that *49 U.S.C. 5332* should be included in this list of requirements.

Several comments to the docket expressed concern regarding the need for approval of the STIP when submitted to the FHWA and the FTA. While we still require joint approval, we have revised paragraph (b) to delete the proposed time frames of "every four years" or "at the time the amended STIP is submitted." We will also make a joint finding on the "STIP," rather than "the projects in the STIP."

Some commenters raised questions regarding the authority in paragraph (c) for the FHWA and the FTA approval of a STIP to continue for up to 180 days under extenuating circumstances even though a State has missed the deadline for its four-year update. Several comments suggested that the 180 calendar day limit for STIP extensions should be expanded and most supported not putting any time limit on the STIP extension period. At the same time, some national and regional advocacy organizations opposed allowing any STIP extensions. This provision has been in the planning regulations since the original rule relating to STIPs was adopted in October 1993, following the enactment of the ISTEA. Although the statute specifies that STIPs shall be updated every four years, Congress did not specify any consequences of missing this deadline by failing to complete the update within the specified period. Because Congress was silent on the consequences of the failure to update the STIP within the four-year period, the FHWA and the FTA have some latitude in interpreting Congress' intent. This discretion is further manifested in the statute by the fact that the FHWA and the FTA are given responsibility to approve the STIP (*23 U.S.C. 135(g)(6)* and *49 U.S.C. 5304(g)(6)*). Since the October 1993 planning rule, the FHWA and the FTA have interpreted the update requirement strictly, believing that Congress intended the process to work on a regular cycle, and that regular updates were essential to the viability of the transportation planning process. Therefore, we have concluded that approval of the STIP should only continue past the update time period specified in statute when there are extenuating circumstances beyond the control of the State DOT that causes it to miss its update deadline. [*7236]

Examples of extenuating circumstances include (but are not limited to): (a) late action by the Governor or State legislature on revenue that was reasonably expected to be available for transportation projects in the STIP, whereby instances have occurred when the STIP was nearing the completion of the update process (public review and comments had been received), but just before adoption the funding was severely restricted, thus a new update process (based on new fiscal constraint reality) needed to be commenced; or (b) disasters, both natural and man-made, have caused States to divert both funding and staff resources away from the STIP update process.

Further, the FHWA and the FTA believe that such an approval cannot extend indefinitely, but only be of limited duration (i.e., 180 calendar days). Therefore, we have retained the provision in paragraph (c) for an extension of the STIP update under extenuating circumstances. However, paragraph (c) has been slightly modified to clarify that, while the FHWA and the FTA approval may continue for a limited period of time based on extenuating circumstances, the statutory deadline for the update has not been changed. We have also clarified that the 180-day period refers to "calendar days."

Many comments were received questioning why the existing flexibility to maintain or establish operations for highway operating assistance was eliminated here and in § 450.328 (TIP actions by the FHWA and the FTA). This was an erroneous omission in the NPRM and the language has been restored to correct this error.

A small number of national and regional advocacy organizations expressed concern that the rule does not provide enough detail on the standards that the FHWA, the FTA and State DOTs should apply in making a statewide planning finding. We believe that the entire context of the rule and of the statute sufficiently identify the criteria to be used in making a finding that the transportation planning process meets or substantially meets these requirements. We do not believe additional detail is required in the rule. However, if necessary, the FHWA and the FTA will provide non-regulatory guidance, training and technical assistance.

Section 450.220 Project Selection From the STIP

The docket included 20 documents that contained about 20 comments on this section. The majority of the comments were from State DOTs. MPOs and COGs, as well as transit agencies, city/county governments, and national and regional advocacy groups, also provided comments.

All of the comments pertained to the two questions posed in the preamble to the NPRM: "whether States should be required to prepare an 'agreed to' list of projects at the beginning of each of the four years in the STIP, rather than only the first year" and "whether a STIP amendment should be required to move projects between years in the STIP, if an 'agreed to' list is required for each year." Predominantly, comments asserted that requiring a State DOT or MPO to submit an agreed-to list at the beginning of each of the four years of the TIP/STIP or requiring an amendment to move projects between years in the STIP unnecessarily limited flexibility and thus should not be a requirement. The FHWA and the FTA agree with the majority of the comments. Therefore, no change was made to the rule language.

We have clarified paragraph (b) to indicate that project selection shall be made according to procedures provided in § 450.330 (Project Selection From the TIP).

Section 450.222 Applicability of NEPA to Statewide Transportation Plans and Programs

The docket includes very few comments on this section. One concern expressed is that this section or Appendix A would make planning reviewable under NEPA. The purpose of this section, however, is to reiterate the statutory provisions that clearly say that the statewide transportation planning process decisions are not subject to review under NEPA. We have changed this section to mirror the language in *23 U.S.C. 135(j)* and *49 U.S.C. 5304(j)*.

Section 450.224 Phase-In of New Requirements

The docket included 30 documents that contained almost 100 comments on this section with about half from State DOTs, one-fifth from national and regional advocacy organizations, one-fifth from MPOs and COGs, and the rest from city/county/State agencies.

All comments received indicated that it will be difficult to meet the SAFETEA-LU July 1, 2007, deadline. Subsequent to the preparation of the proposed rule, but prior to its publication, the FHWA and the FTA disseminated additional guidance regarding the phase-in requirements on May 2, 2006. n10 Many of the comments to the docket addressed issues that were clarified in our May 2, 2006, guidance. The provisions of the guidance have been incorporated into the regulation. Specifically, we have clarified that long-range statewide transportation plans and STIPs adopted and approved prior to July 1, 2007, may be developed using the TEA-21 requirements or the provisions and requirements of this part.

n10 This guidance document, "SAFETEA-LU Deadline for New Planning Requirements", dated May 2, 2006, is available on the following URL: *http://www.fhwa.dot.gov/hep/plandeadline.htm*.

We have also clarified, in paragraph (a), what actions may be taken prior to July 1, 2007, on long-range statewide transportation plans and STIPs.

One MPO, half of the national and regional advocacy organizations and a quarter of the State DOTs commented that the regulations should clearly state that partial STIP approvals are allowable if one MPO or region is not SAFETEA-LU compliant. Because the regulation already allows for approval of partial STIPs (see § 450.218(b)(1)(iii)), no change was made to the regulation. Approval of partial STIPs is acceptable, primarily when difficulties are encountered in cooperatively developing the STIP portion for a particular metropolitan area or for a Federal Lands agency. If

an MPO is able to produce a TIP that is SAFETEA-LU compliant, the Federal action would be to amend that TIP into the STIP, making the portion of the STIP that covers that region SAFETEA-LU compliant.

Most of the national and regional advocacy organizations and most of the State DOTs commented that the deadline for transportation plan, STIP and TIP action should apply to State/MPO approval action rather than the FHWA/FTA conformity finding. The FHWA and the FTA issued guidance on "Clarification of Plan Requirements in Nonattainment and Maintenance Areas" on May 25, 2001. n11 Since the FHWA and the FTA do not determine conformity of STIPs, we are revising this section to eliminate conformity determinations. However, the rest of the rule language is consistent with current practice, and therefore, no other change was made.

n11 This guidance document, "Clarification of Plan Requirements in Nonattainment and Maintenance Areas," dated May 25, 2001, can be found via the internet at the following URL: *http://www.fhwa.dot.gov/environment/conformity/planup-m.htm.*

Most of the commenters stated that *23 U.S.C. 135(b)* requires only "updates" to reflect changes required by SAFETEA-LU after July 1, 2007, not "amendments." The comments noted that requiring a STIP re-adoption for minor amendments would be a [*7237] substantial burden and is a stricter interpretation of the statute than Congress intended. Prior to the adoption of this rule, there has not been an accepted definition of or distinction between the terms "update" or "amendment." As established in Section 450.104 (Definitions) of this rule, the FHWA and the FTA consider an amendment to the STIP to be a major change to the transportation plan or program. The FHWA and the FTA believe that any major change to the transportation plan or program, whether called an "amendment" or an "update" under this regulation, is considered for this purpose an "update" as referenced in *23 U.S.C. 135(b)*. However, an "administrative modification" would not be covered by this requirement. This rule clarifies the definition of these terms for the future.

One national and regional advocacy organization stated that Congress specified that the SAFETEA-LU phase-in period should begin on July 1, 2007, not be completed by that date. The FHWA and the FTA believe that this is an incorrect interpretation of the statute. The FHWA and the FTA agree that administrative modifications can be made to STIPs after July 1, 2007, but amendments or revisions that would add or delete a major new project to a TIP, STIP, or transportation plan would not be acceptable after July 1, 2007, in the absence of meeting the provisions and requirements of this part. This information has been included in paragraph (c).

Subpart C--Metropolitan Transportation Planning and Programming

Section 450.300 Purpose

No comments were received on this section and no changes were made.

Section 450.302 Applicability

No comments were received on this section and no changes were made.

Section 450.304 Definitions

No comments were received on this section and no changes were made.

Section 450.306 Scope of the Metropolitan Transportation Planning Process

The docket included about 80 separate comments on this section with almost half from MPOs and COGs. Several national and regional advocacy organizations also commented on this section. Most of the remaining comments came from State DOTs and transit agencies. City/county governments and others also commented on this section.

In comments on this section and § 450.206 (Scope of the statewide transportation planning process), many MPOs and COGs, some national and regional advocacy organizations and a few State DOTs noted that paragraph (a)(3) embellished the statutory language for the "security" planning factor. Organizations that commented on this issue were concerned that the expanded language would require State DOTs and MPOs to go far beyond their traditional responsibilities in planning and developing transportation projects, which was not intended by the SAFETEA-LU. The FHWA and the FTA agree and have revised the language in paragraph (a)(3) to match the language in the statute.

After further review, the FHWA and the FTA have changed the word "should" to "shall" in paragraph (b) to be consistent with statutory language in *23 U.S.C. 134(h)(1)* and *49 U.S.C. 5303(h)(1)*.

Most of the State DOTs and several of the national and regional advocacy organizations that commented on similar text in § 450.206 (Scope of the statewide transportation planning process) said that the text in paragraph (b) of that section should be revised to be similar to the text in the October 1993 planning rule acknowledging that the degree of consideration will reflect the scales and complexity of issues within the State. The FHWA and the FTA agree with those comments and revised this section, as well, to be consistent. We have included the language from the October 1993 planning rule with one change. The phrase "transportation problems" was changed to "transportation system development."

After further review, we have clarified paragraph (c) to mirror the language in *23 U.S.C. 134(h)(2)* and *49 U.S.C. 5303(h)(2)*. The paragraph now specifically refers to "any court under *title 23 U.S.C., 49* U.S.C. Chapter 53, subchapter II of title 5 U.S.C. Chapter 5, or title 5 U.S.C. Chapter 7."

Some MPOs and COGs and a few national and regional advocacy organizations asked for clarification on the meaning of asset management principles and information on how to link them to performance measures. The FHWA and the FTA have changed "are encouraged to" to "may" in paragraph (e) to provide additional flexibility for MPOs, State DOTs, and public transportation operators to apply asset management principles appropriate to their individual context. If necessary, the FHWA and the FTA will provide additional non-regulatory guidance, training and technical assistance.

Many of the State DOTs and a few of the national and regional advocacy organizations that provided comments on this topic said the text in paragraph (f) went beyond statutory requirements. The FHWA and the FTA agree with these comments and revised the rule accordingly by adding "to the maximum extent practicable" in paragraph (f).

Most transit agencies, several State DOTs, MPOs and COGs, and others provided comments on the requirement in paragraph (g) for the metropolitan transportation planning process to be consistent with the development of coordinated public transit-human services transportation plans. In general, commenters requested additional information on the plans, who was responsible for developing the plans and how they were to be consistent. Some commenters recommended removing the requirement entirely.

Communities have broad flexibility in determining the roles and responsibilities in this area, including selecting the organization charged with developing the coordinated public transit-human services transportation plan. The FHWA and the FTA encourage review of the proposed FTA Circulars for implementing the *49 U.S.C. 5310*, *5316*, and *5317* programs (New Freedom Program Guidance, The Job Access And Reverse Commute (JARC) Program, Elderly Individuals and Individuals With Disabilities Program), published on September 6, 2006. n12 Consistency between public transit-human services planning and the metropolitan transportation planning process is required. The provisions for promoting consistency between the planning processes were revised to clarify and add flexibility. In order to receive funding in title 49 U.S.C. Chapter 53, projects from the coordinated public transit-human services transportation plans must be incorporated into the metropolitan transportation plan, TIP and STIP. And, in areas with a population greater than 200,000, solicitation of projects for implementation from the public transit-human services transportation plan must be done in cooperation with the MPO.

n12 These documents, "Elderly Individuals and Individuals With Disabilities, Job Access and Reverse Commute, and New Freedom Programs: Coordinated Planning Guidance for FY 2007 and Proposed Circulars" was published September 6, 2006, and are available via the internet at the following URLs: *http://www. fta. dot. gov/publications/publications-5607. html* or *http://a257. g. akamaitech. net/7/257/2422/01jan20061800/edocket. access. gpo. gov/2006/pdf/E6-14733. pdf*.

Several transit agencies and a few State DOTs and others suggested deleting the portion of paragraph (h) [*7238] related to Regional Transit Security Strategies (RTSS) due to the confidential nature of these plans. Reference to the RTSS was removed from paragraph (h). Instead, we have added a reference to "other transit safety and security planning and review processes, plans, and programs, as appropriate."

Section 450.308 Funding for Transportation Planning and Unified Planning Work Programs

There were a few comments on this section from MPOs and COGs. Those that commented on this section supported the flexibility provided in paragraph (d) and several requested clarification on issues such as the definition of "MPO staff," and different processes expected of non-TMA and TMA MPOs. If necessary, the FHWA and the FTA will provide additional clarification through development of technical reports or guidance; however we did not make any changes to this section.

Section 450.310 Metropolitan Planning Organization Designation and Redesignation

The docket included about 30 separate comments on this section with the most coming from national and regional advocacy organizations. Most of the remaining comments came from State DOTs, MPOs and COGs. Local agencies also commented on this section.

Several of the MPOs and COGs and national and regional advocacy organizations that provided comments on this section worried that the Census' continuous sample American Community Survey (ACS) would change the official populations in urbanized areas more often than once a decade, and recommended that paragraph (a) should specifically state that urbanized area populations be based only on each decennial Census. The Census Bureau historically has identified and defined the boundaries and official population of urbanized areas only in conjunction with each decennial Census. This practice will not change as a result of the ACS. The ACS is collected in a nationwide sample of households, and does not constitute a full enumeration of the U. S. population. Consequently, it does not provide the necessary basis for adjusting the boundaries of an urbanized area or revising its total population. Moreover, changing this paragraph would preclude the option for a fast growing urban area to request (and pay for conducting) a special mid-decade Census for the purpose of determining whether its population increased beyond the threshold for designation as an MPO or TMA. While this has been done infrequently in the past, the FHWA and the FTA do not want to prohibit this option. Therefore, no change was made to this paragraph.

A few national and regional advocacy organizations and State DOTs had comments on paragraph (c), ranging from deleting language that they said went beyond statute to clarifying the phrase "to the extent possible" to including the public in designation. The language in this paragraph was carried forward from the October 1993 planning rule. However, the FHWA and the FTA agree that the implied regulatory standing was unclear. This paragraph has been changed to mirror the language in *23 U.S.C. 134(f)(2)* and *49 U.S.C. 5303(f)(2)*. The intent of this paragraph is to encourage States to enact legislation that gives MPOs specific authority to carry out transportation planning for the entire metropolitan planning area they serve. Without such enabling legislation, MPOs may lack the necessary leverage to effectively coordinate transportation projects across local jurisdictions.

A national and regional advocacy organization suggested language be added to paragraph (d) to encourage broad representation, especially from public transportation operators, on MPO policy boards. The statute (*23 U.S.C. 134(d)(2)(B)* and *49 U.S.C. 5303(d)(2)(B)*) explicitly provides for public transportation agencies to be included on policy boards. To clarify this issue, paragraph (d) has been changed to better reflect the language in the statute. Further, we have added language to the rule to encourage MPOs to increase the representation of local elected officials and public transportation agencies on their policy boards, subject to the requirements of paragraph (k) of this section.

After further review, we have changed the language in paragraph (e) from "should" to "shall" to be consistent with statute (*23 U.S.C. 134(d)(1)* and *49 U.S.C. 5303(d)(1)*).

A question was asked about the purpose of paragraph (f). This is not a new paragraph. In fact, it first appears in Federal statute (*23 U.S.C. 134(d)(3)* and *49 U.S.C. 5303(d)(3)*) as a means of "grandfathering" in those multimodal transportation agencies that were in existence at the time of enactment of ISTEA, which were serving many of the functions of an MPO. This paragraph continues to appear in the SAFETEA-LU (*23 U.S.C. 134(d)(3)* and *49 U.S.C. 5303(d)(3)*, but was not explicitly included in past versions of the metropolitan transportation planning regulations. The FHWA and the FTA agree that it is no longer necessary and have removed it from the rule. Most agencies covered by the provisions of *23 U.S.C. 134(d)(3)* and *49 U.S.C. 5303(d)(3)* have already been officially designated as an MPO, and this option still will have the force of law in the statute.

Some commenters suggested that paragraph (g) (now paragraph (f)) should allow MPOs to use non-profit organizations for staff work. This paragraph brings forward the language from the October 1993 planning rule. Nothing in this paragraph prohibits an MPO from using the staff resources of other agencies, non-profit organizations, or contractors to carry out selected elements of the metropolitan planning process. However, to clarify this issue, we have added "non-profit organizations, or contractors" to this paragraph.

A few MPOs recommended deleting "current MPO board members" as one definition for units of general purpose local government from paragraph (k) (now paragraph (j)). The FHWA and the FTA agree that allowing the option of "local elected officials currently serving on the MPO" to represent all units of general purpose local government for the purposes of redesignation could result in unintended problems. The FHWA and the FTA have deleted "local elected

officials currently serving on the MPO" from this paragraph and moved the remaining text into the body of paragraph (j).

Many of the State DOTs and a few of the national and regional advocacy organizations and MPOs and COGs that commented on this section had specific comments on paragraph (l) (now paragraph (k)) saying that the paragraph goes beyond statutory requirements and should be deleted and requesting clarification and minor word changes. The intent of this paragraph is that while an MPO may identify the need for redesignation, actual redesignation must be carried out in accordance with statutory redesignation procedures. The FHWA and the FTA have added language to this paragraph to clarify that redesignation is in accordance with the provisions of this section (§ 450.310). We have also modified paragraph (m) (now paragraph (l)) to reference the substantial change discussion in paragraph (k).

The docket contained a comment in regards to paragraph (l) (now paragraph (k)) that § 4404 of the SAFETEA-LU provides specific designation and redesignation authority for the States of Alaska and Hawaii. Because § 4404 of the SAFETEA-LU does not apply [*7239] universally to all MPOs, it is not included in the rule.

Section 450.312 Metropolitan Planning Area Boundaries

The docket included a few comments on this section with the most coming from MPOs and COGs and the remaining comments from State DOTs and national and regional advocacy organizations. Several of the comments provided general support for this section of the planning rule as written.

A few of the comments related to paragraph (b) and asked for minor text changes or clarification on how the section may limit flexibility. The FHWA and the FTA revised the paragraph to make it more consistent with statutory text and, thus, it should not limit flexibility beyond statutory requirements. We also added a reference to the requirements in § 450.310(b) to reiterate that the MPA boundary may be established to coincide only if there is agreement of the Governor and the affected MPO in the same manner as is required for designating an MPO in the first place.

One of the comments regarding paragraph (d) asked for clarification for requiring that the metropolitan planning area (MPA) boundary coincide with regional economic development or growth forecasting areas, in particular, for complex areas having multiple, non-coincident boundaries. This paragraph says that metropolitan planning boundaries "may" be established to coincide with regional economic and growth forecasting areas. This paragraph is permissive, not mandatory. Instead, this paragraph provides MPOs with the flexibility to allow their planning boundaries to coincide with other, established boundaries, but does not require them to do so. For clarification and simplicity, the word "the" was deleted from the beginning of this paragraph.

In response to comments on this section, we have also clarified paragraph (h) to indicate that all boundary adjustments that change the composition of the MPO may require redesignation of one or more such MPOs, rather than only boundary changes that "significantly" change the composition of the MPO.

Section 450.314 Metropolitan Planning Agreements

The docket included more than 70 comments on this section, with the most coming from State DOTs, followed by MPOs and COGs. The remaining comments were from national and regional advocacy organizations, local agencies and public transportation providers.

Most of the State DOTs and MPOs, many of the national and regional advocacy organizations, and a few of the public transportation providers and local agencies that commented on paragraph (a) expressed concern about an unintended burden resulting from the requirements outlined in this paragraph and requested clarification. Some suggested text changes such as using the term "memorandum of understanding" in place of "agreement." The MPO agreements are intended to document the cooperative arrangements among the various agency participants that participate in the metropolitan transportation planning process. The FHWA and the FTA encourage a single agreement. However, the rule language has been changed to reflect the option for multiple agreements. Removing the implied requirement for a single written agreement should allow many current planning agreements to satisfy the provisions of this paragraph provided they are written documents.

Many of the State DOTs that commented on this section said they find paragraph (a)(1) too prescriptive and redundant with requirements in other sections of the planning rule. On the other hand, several MPOs and COGs and national and regional advocacy organizations that provided comments on this section wrote to support the proposed rule language in this paragraph. The FHWA and the FTA believe the information in this paragraph is helpful to identify what

shall be included in the written agreement(s). No change was made to this language, but it has been moved into the body of paragraph (a).

Many of the State DOTs that commented on this section said they found paragraph (a)(2) too prescriptive and redundant with requirements in other sections of the planning rule. Several MPOs and COGs and national and regional advocacy organizations said they would like clarification or minor text changes in this paragraph. A small number of MPOs and COGs and national and regional advocacy organizations that provided comments on this section wrote to support the proposed rule language in this paragraph. The FHWA and the FTA removed this paragraph from the final rule since the issues are adequately addressed in § 450.316 (Interested parties, participation, and consultation).

The docket includes a comment on this section objecting to the requirement in paragraph (f) that a planning agreement between two or more MPOs serving part of a TMA shall address specific TMA requirements, such as the suballocation of Surface Transportation Program (STP) funds. The FHWA and the FTA revised the final rule to clarify that the entire adjacent urbanized area does not need to be treated as a TMA. However, a written agreement shall be established between the MPOs with MPA boundaries including a portion of the TMA, which clearly identifies the roles and responsibilities of each MPO in meeting specific TMA requirements (e.g. congestion management process, STP funds suballocated to the urbanized area over 200,000 population, and project selection).

Representatives of State DOTs and private bus operators requested the inclusion of detailed methodologies for engaging private service providers in the transportation planning process, as well as standards for ascertaining compliance with private enterprise provisions and a complaint process. To ensure maximum flexibility for localities to tailor programs to the needs of private service providers in their areas, the FHWA and the FTA will use non-regulatory guidance, training, and technical assistance, as necessary, for disseminating information on optional approaches to private sector participation.

Section 450.316 Interested Parties, Participation, and Consultation

The FHWA and the FTA received more than 80 comments on this section with the most coming from MPOs and COGs, followed by national and regional advocacy organizations. Public transportation providers, State DOTs and local agencies also provided comments on this section. In general, many of the MPOs and some of the others who provided comments on this section said that they supported the rule as written or with minor changes.

A few MPOs in regards to paragraph (a) asked about the difference between the participation plan identified in this rule and the public involvement plan under the prior two authorizations, the ISTEA and the TEA-21. The participation plan in this section has several elements not required of the public involvement plan: the participation plan shall be developed in consultation with all interested parties; and the participation plan shall include procedures for employing visualization techniques and making public information available in electronically accessible formats and means.

There were a variety of comments regarding the list of interested parties in paragraph (a) from several MPOs and COGs, national and regional advocacy [*7240] organizations and public transportation providers. The comments ranged from specifically including additional groups by reference to adding "non-citizens" or "the public" and "limited English proficiency" to adding definitions for the groups that are in the list to making the list optional. The FHWA and the FTA find that, with a general reference to "other interested parties," MPOs have adequate flexibility to develop and implement a participation plan that provides an appropriate list of interested parties for their individual metropolitan area. MPOs are encouraged to broaden the list of interested parties beyond those listed in statute, as appropriate. The list in the rule has been modified to match the language in the statute (*23 U.S.C. 134(i)(5)* and *49 U.S.C. 5303(i)(5)*). No additional groups were added. The FHWA and the FTA note that *49 U.S.C. 5307(c)* requires grant recipients to make available to the public information on the proposed program of projects and associated funding.

Representatives of a State DOT and private bus operators requested the inclusion of detailed methodologies for engaging private service providers in the transportation planning process, as well as standards for ascertaining compliance with private enterprise provisions and a complaint process. These commenters also requested that the private bus operators be specifically included in the list of interested parties. To ensure maximum flexibility for localities to tailor programs to the needs of private service providers in their areas, we will rely upon non-regulatory guidance, training, and technical assistance for disseminating information on optional approaches to private sector participation.

A Federal agency commented that the public or an agency should be able to identify itself to the MPO as an appropriate contact without having to be identified to participate by the MPO. The FHWA and the FTA agree. If an MPO is

approached, the MPO should consider the request and determine whether the consultation is appropriate. We believe that this flexibility is allowed within the existing rule language. No change has been made to this section of the rule.

A few MPOs and COGs that commented on this section asked for a definition of "reasonable access" under paragraph (a)(1)(ii). This requirement carries forward what was in the October 1993 planning rule. The FHWA and the FTA find that MPOs have had adequate flexibility to define "reasonable access" when they developed and revised their public involvement plan and will continue to have that flexibility with the requirements for a participation plan. This definition was not added to the rule.

Many MPOs and COGs and some of the other organizations that commented on this section wrote to support the requirement for employing visualization in paragraph (a)(1)(iii). Several MPOs and COGs asked for clarification or subsequent guidance on effective and appropriate use of visualization techniques. The FHWA and the FTA agree that there is a need for more technical information on the use of visualization techniques and will provide technical reports and non-regulatory guidance, as necessary, subsequent to the publication of this rule.

A few MPOs and COGs said in reference to paragraph (a)(1)(iv) that making technical information available could be overly burdensome. This requirement conforms to the requirement in statute (*23 U.S.C. 134 (i)(5)* and *49 U.S.C. 5303(i)(5)*). MPOs have flexibility to define specific techniques for making information available when they develop and revise their public participation plan.

Several MPOs and COGs and a public transportation provider wrote in reference to paragraph (a)(1)(vi) that the term "explicit consideration" could be burdensome and needs clarification. This language was similar to a requirement under the public involvement plan and based on that experience, the FHWA and the FTA believe that MPOs have adequate flexibility to define specific techniques when they develop and revise their public participation plan. If needed, the FHWA and the FTA will provide subsequent information on accepted practices in technical reports or guidance.

Several MPOs and COGs wrote in regards to paragraph (a)(1)(viii) that the section could result in unintended burdens on MPOs. In reviewing the statutory requirement (*23 U.S.C. 134 (j)(4)* and *49 U.S.C. 5303(j)(4)*) and the October 1993 planning rules, the FHWA and the FTA agree that the current wording, which was intended to simplify requirements, could lead to unintended burdens. The language in this paragraph has been revised to follow more closely the language in the October 1993 planning rule and now reads: "Providing an additional opportunity for public comment, if the final transportation plan or TIP differs significantly from the version that was made available for public comment by the MPO and raises new material issues which interested parties could not reasonably have foreseen from the public involvement efforts."

A few of the MPOs and COGs and a few of the national and regional advocacy organizations were concerned in paragraph (b) about their ability to consult with resource agencies. Upon further review of this paragraph, the FHWA and the FTA have revised paragraph (b). The originally proposed paragraph (b) "mixed and matched" consultation requirements from the SAFETEA-LU. We have removed the consultation discussion related to land management, resource, and environmental agencies from this paragraph. That information is included in § 450.322 (Development and content of the metropolitan transportation plan). The sentences that read "To coordinate the planning functions to the maximum extent practicable, such consultation shall compare metropolitan transportation plans and TIPs, as they are developed, with the plans, maps, inventories, and planning documents developed by other agencies. This consultation shall include, as appropriate, contacts with State, local, Indian Tribal, and private agencies responsible for planned growth, economic development, environmental protection, airport operations, freight movements, land use management, natural resources, conservation, and historic preservation." were deleted. Instead, the phrase "(including State and local planned growth, economic development, environmental protection, airport operations, or freight movements) or coordinate its planning process (to the maximum extent practicable) with such planning activities" was added. This phrase is consistent with the requirements in the SAFETEA-LU that apply to consultation in metropolitan transportation plan and TIP coordination (*23 U.S.C. 134(i)(4)(A)* and *49 U.S.C. 5303(i)(4)(A)*). Also to be consistent with statute, the term "shall" was changed to "should."

A few of the MPOs and COGs, a few of the national and regional advocacy organizations, a State DOT and a local agency that provided comments on this section said regarding paragraph (b), that natural resource agencies are not required to respond when consulted and that this places an unreasonable burden on MPOs. However, several MPOs wrote in support of this specific paragraph. The language regarding consultation has been modified to reflect the statutory requirement (*23 U.S.C. 134(i)(4)* and *49 U.S.C. 5303(i)(4)*). The FHWA and the FTA believe that clarification of what constitutes a reasonable attempt at consultation is better placed in guidance [*7241] and illustrations of practice where there is greater flexibility to address regional differences and the evolution of practice.

Also regarding paragraph (b), a local agency said that MPOs should not be required to consult with private agencies responsible for planned growth. The FHWA and the FTA believe there may be a need to consult with such organizations given the increase in public-private partnerships. However, the specific phrase "private agencies responsible for growth" is not in the statute or the October 1993 planning regulations and has the potential to cause confusion in the implementation of this rule. Accordingly, the FHWA and the FTA removed the phrase "private agencies responsible for planned growth."

A few MPOs and COGs that commented on this section said in regards to paragraph (b) that MPO requirements to consult should be limited to the metropolitan transportation plan, and not the TIP. No change was made to the rule because the requirement reflects language in the statute (*23 U.S.C. 134(i)(4)* and *49 U.S.C. 5303(i)(4)*).

A small number of national and regional advocacy organizations expressed concern that the rule does not explicitly require that all information used in making a conformity determination be made available for public comment. The transportation conformity rule (*40 CFR 93.105(e)*) requires that agencies establish a proactive public involvement process and that requirements of § 450.316(a) be followed and met before conformity may be determined. The FHWA and the FTA find that the public involvement requirements of this section and the conformity rule are sufficient to provide the public with appropriate access to the information developed during a conformity determination.

Representatives of a State DOT and private bus operators requested the inclusion of detailed methodologies for engaging private service providers in the transportation planning process, as well as standards for ascertaining compliance with private enterprise provisions and a complaint process. To ensure maximum flexibility for localities to tailor programs to the needs of private service providers in their areas, we will rely upon non-regulatory guidance, training, and technical assistance for disseminating information on optional approaches to private sector participation.

Some MPOs and COGs and a few national and regional advocacy organizations wrote that the consultation process with other governments and agencies referenced in paragraph (e) does not need to be documented. The FHWA and the FTA find that documentation of consultation processes is essential to a party's ability to understand when, how, and where the party can be involved. This paragraph has been changed to require that MPOs, to the extent practicable, develop a documented process(es) that outlines roles, responsibilities, and key decision points for consulting with other governments and agencies.

Section 450.318 Transportation Planning Studies and Project Development

Section 1308 of the TEA-21 required the Secretary to eliminate the MIS set forth in *§ 450.318 of title 23, Code of Federal R*egulations, as a separate requirement, and promulgate regulations to integrate such requirement, as appropriate, as part of the analysis required to be undertaken pursuant to the planning provisions of title 23 U.S.C. and title 49 U.S.C. Chapter 53 and the National Environmental Policy Act of 1969 (NEPA) for Federal-Aid highway and transit projects. The purpose of this section is to implement this requirement of Section 1308 of the TEA-21 and eliminate the MIS requirement as a stand-alone requirement. A phrase has been added to paragraph (a) to clarify the intent of this section.

The docket included almost 20 documents that contained more than 50 comments on this section with about two-thirds from State DOTs and the rest from MPOs or COGs, as well as national and regional advocacy organizations. The comments on this section were similar to, and often referenced, the comments on § 450.212 (Transportation planning studies and project development).

Most of the comments received supported the concept of linking planning and NEPA but opposed including Appendix A in the rule. The purpose of an Appendix to a regulation is to improve the quality or use of a rule, without imposing new requirements or restrictions. Appendices provide supplemental, background or explanatory information that illustrates or amplifies a rule. Because Appendix A provides amplifying information about how State DOTs, MPOs and public transportation operators can choose to conduct transportation planning-level choices and analyses so they may be adopted or incorporated into the process required by NEPA, but does not impose new requirements, the FHWA and the FTA find that Appendix A is useful information to be included in support of this and other sections of the rule. A phrase has been added and this information has been included as paragraph (e). Additionally, we have added disclaimer language at the introduction of Appendix A.

The FHWA and the FTA recognize commenters' concerns about Appendix A, including the recommendation that this information be kept as guidance rather than be made a part of the rule. First, information in an Appendix to a regulation does not carry regulatory authority in itself, but rather serves as guidance to further explain the regulation. Sec-

ondly, as stated above, Section 1308 of TEA-21 required the Secretary to eliminate the MIS as a separate requirement, and promulgate regulations to integrate such requirement, as appropriate, as part of the transportation planning process. Appendix A fulfills that Congressional direction by providing explanatory information regarding how the MIS requirement can be integrated into the transportation planning process. Inclusion of this explanatory information as an Appendix to the regulation will make the information more readily available to users of the regulation, and will provide notice to all interested persons of the agencies' official guidance on MIS integration with the planning process. Attachment of Appendix A to this rule will provide convenient reference for State DOTs, MPOs and public transportation operator(s) who choose to incorporate planning results and decisions in the NEPA process. It will also make the information readily available to the public. Additionally, the FHWA and the FTA will work with Federal environmental, regulatory, and resource agencies to incorporate the principles of Appendix A in their day-to-day NEPA policies and procedures related to their involvement in highway and transit projects. For the reasons stated above, after careful consideration of all comments, the FHWA and the FTA have decided to attach Appendix A to the final rule as proposed in the NPRM.

Most State DOTs and several MPOs and COGs, and national and regional advocacy organizations that commented on this section were concerned that the language in paragraph (a) is too restrictive. The FHWA and the FTA agree that planning studies need not "meet the requirements of NEPA" to be incorporated into NEPA documents. Instead, we have changed the language in paragraph (a) to "consistent with" NEPA. In addition, we have added the phrase "multimodal, systems-level" before "corridor or subarea" to [*7242] emphasize the "planning" venue for environmental consideration.

Commenters on this section also requested that the rule clarify that the MPO has the responsibility for conducting corridor or subarea studies in the metropolitan transportation planning process. The FHWA and the FTA recognize that the MPO is responsible for the metropolitan transportation planning process. However, we do not want to preclude State DOTs or public transportation operators, in consultation or jointly with the MPO, from conducting corridor or subarea studies. Therefore, we have changed paragraph (a) to add the sentence "To the extent practicable, development of these transportation planning studies shall involve consultation with, or joint efforts among, the MPO(s), State(s), and/or public transportation operator(s)."

It is important to note that this section does not require NEPA-level evaluation in the transportation planning process. Planning studies need to be of sufficient disclosure and embrace the principles of NEPA so as to provide a strong foundation for the inclusion of planning decisions in the NEPA process. The FHWA and the FTA also reiterate the voluntary nature of this section and the amplifying information in Appendix A. States, public transportation operators and/or MPOs may choose to undertake studies which may be used in the NEPA process, but are not required to do so.

Several State DOTs and national and regional advocacy organizations were concerned about the identification and discussion of environmental mitigation. They did not believe that detail on environmental mitigation activities was appropriate in the transportation planning process. The FHWA and the FTA agree. Paragraph (a)(5) calls for "preliminary identification of environmental impacts and environmental mitigation." The FHWA and the FTA believe that the term "preliminary" adequately indicates that State DOTs are not expected to provide the same level of detail on impacts and mitigation as would be expected during the NEPA process. Furthermore, SAFETEA-LU requires a discussion of types of potential environmental mitigation activities and potential areas to carry out these activities. § 450.322 (Development and content of the metropolitan transportation plan) specifically provides that "The discussion may focus on policies, programs, or strategies, rather than at the project level."

Some State DOTs suggested incorporating planning decisions rather than documents into the NEPA process. The FHWA and the FTA find that decisions made as part of the planning studies may be used as part of the overall project development process and have changed paragraph (a) to include the word "decisions" as well as "results." It is important to note, however, that a decision made during the transportation planning process should be presented in a documented study or other source materials to be included in the project development process. Documented studies or other source materials may be incorporated directly or by reference into NEPA documents, as noted in § 450.318(b). We have added "or other source material" to paragraph (b) to recognize source materials other than planning studies may be used as part of the overall project development process.

Based on comments on Appendix A, we added the phrase "directly or" in paragraph (b), to indicate the use of publicly available planning documents from subsequent NEPA documents.

Also based on comments on Appendix A, we added the phrase "systems-level" in paragraph (b)(2), to emphasize that these corridor or subarea studies are conducted during the planning process at a broader scale than project specific studies under NEPA.

Several State DOTs and many others who submitted comments on this section noted that the word "continual" in paragraph (b)(2)(iii) provides more opportunity to comment than is necessary. We agree and have replaced "continual" with "reasonable" in this paragraph.

Several State DOTs and a national and regional advocacy organization suggested adding a "savings clause" in a new paragraph. A savings clause would ensure that the new provisions regarding corridor or subarea studies do not have unintended consequences. The specific elements requested to be included in the "savings clause" were statements that: (a) The corridor and subarea studies are voluntary; (b) corridor and subarea studies can be incorporated into the NEPA process even if they are not specifically mentioned in the metropolitan transportation plan; (c) corridor and subarea studies are not the sole means for linking planning and NEPA; and (d) reiterate the statutory prohibition on applying NEPA requirements to the transportation planning process. The concepts recommended in the "savings clause" all reiterate provisions found elsewhere in the rule or statute. The FHWA and the FTA do not agree that it is necessary to repeat those provisions in this section.

The docket included a comment that corridor or subarea studies should be required, not voluntary, to be included in NEPA studies. Given the opposition to requiring NEPA-level analysis in the transportation planning process, the FHWA and the FTA find that the permissive nature of this section and the guidance provided in Appendix A strike the appropriate balance.

The docket also included a question asking what needs to be included in an agreement with the NEPA lead agencies to accomplish the integration of the planning and NEPA processes. The FHWA and the FTA have determined that identification of what information appropriately belongs in the agreement should be disseminated as non-regulatory guidance, complemented by a wide array of effective practice case studies and supported by training and technical assistance. Consequently, no change was made to the rule. We have not required that corridor or subarea studies be included or incorporated into NEPA studies.

A national and regional advocacy organization raised a number of issues and asked a number of questions regarding this section. Many of these concerns were also expressed by some transit agencies and a small number of MPOs and COGs. Most of these questions related to more detailed information on this section with regard to the Alternative Analysis requirements for major transit projects. The general concern related to the integration of the planning provisions in Sections 3005, 3006 and 6001 of the SAFETEA-LU and the environmental provisions in Section 6002 of the SAFETEA-LU, coupled with the historical Alternative Analysis process conducted as part of the eligibility requirements for transit proposals. These environment and planning provisions of the SAFETEA-LU are designed to add efficiencies to the project development process by facilitating a smooth transition from planning into the NEPA/project development process. To address these concerns and the specific questions related to the Alternatives Analysis process, the FHWA and the FTA have added paragraph (d) to the rule.

A specific concern was that this section eliminated the option of conducting a NEPA study as part of the Alternative Analysis/corridor study process. The FHWA and the FTA believe this is a misinterpretation of this section. We have been and continue to be staunch advocates of addressing NEPA issues and initiating the formal project level environmental analyses as early as practicable in the overall project development framework, including the [*7243] transportation planning process. This section continues to allow NEPA studies to be initiated, even during the Alternative Analysis/corridor study process.

Another concern was that this section permits the elimination of alternatives but does not provide for the selection of a preferred alternative. Additionally, a subsequent comment indicated that this section does not require the consideration of all reasonable alternatives. As is permitted by the Council on Environmental Quality's regulations, a project sponsor can select a preferred alternative at any time in the project development process but the overall environmental analysis cannot be slanted to support the preferred alternative nor does the identification of a preferred alternative eliminate the requirement to study all reasonable alternatives as part of the environmental analysis. The FHWA and the FTA believe that the rule allows for State DOTs, MPOs and public transportation operators who choose to use planning studies as part of the overall project development process to eliminate alternatives as well as select preferred alternatives, as appropriate. Therefore, no change was made to the rule.

These comments also pointed out that the FTA requires alternatives analysis for New Starts project, but no comparable requirement is specified for highway projects. Unlike FTA's formula funded programs, New Starts has a competition based eligibility requirement and, as such, the FTA requires a level of evaluation and analysis to screen the potential myriad requests they receive for limited funds. Traditionally, applicants select proposed highway projects as part of

FHWA's formula funded programs. When Congress authorizes a competition-based highway program similar to New Starts, the FHWA has established criteria to evaluate and select projects that are eligible for those funds.

It was also noted that § 450.322 (Development and content of the metropolitan transportation plan) requires (in nonattainment and maintenance areas) design concept and scope be identified for projects. This comment raises several issues relative to actual application of the transportation planning process more than the regulation itself. For transportation demand modeling purposes and to meet the requirements of this part, the MPO and/or State DOT uses basic tools (e.g. engineering, capacity, past history, etc.) to identify the design concept and scope of a project, without conducting a formal corridor study. These early decisions are generally made on a broad corridor basis and will be refined as the project advances towards implementation. The commenter appears to favor this section of the rule being mandatory rather than permissive in an attempt to further the state of the practice of planning. Encouragement and incentives for good transportation planning were proffered by the commenter as tools to be used to increase the desirability of conducting corridor studies. The FHWA and the FTA believe Appendix A provides this encouragement and incentives for good transportation planning in identifying ways to utilize planning corridor studies and thereby reduce the amount of repetitive work in the NEPA process. We appreciate the support for the concepts in this section, but, based on all the comments received, find that it is most appropriate for this section to remain voluntary and permissive.

Section 450.320 Congestion Management Process in Transportation Management Areas

The docket included more than 25 documents that contained almost 30 comments on this section with about one-third from State DOTs, one-fifth from national and regional advocacy organizations, half from MPOs and COGs, and the rest from transit operators.

On May 16, 2006, the U.S. Secretary of Transportation announced a national initiative to address congestion related to highway, freight and aviation. n13 The intent of the "National Strategy to Reduce Congestion on America's Transportation Network" is to provide a blueprint for Federal, State and local officials to tackle congestion. USDOT encourages the States and MPO(s) to seek Urban Partnership Agreements with a handful of communities willing to demonstrate new congestion relief strategies and encourages states to pass legislation giving the private sector a broader opportunity to invest in transportation. It calls for more widespread deployment of new operational technologies and practices that end traffic tie-ups, designates new interstate "corridors of the future," targets port and border congestion, and expands aviation capacity.

n13 Speaking before the National Retail Federation's annual conference on May 16, 2006, in Washington, DC, former U.S. Transportation Secretary Norman Mineta unveiled a new plan to reduce congestion plaguing America's roads, rails and airports. The National Strategy to Reduce Congestion on America's Transportation Network includes a number of initiatives designed to reduce transportation congestion. The transcript of these remarks is available at the following URL: ***http://www.dot.gov/affairs/minetasp051606.htm***.

U.S. DOT encourages State DOTs and MPOs to consider and implement strategies, specifically related to highway and transit operations and expansion, freight, transportation pricing, other vehicle-based charges techniques, congestion pricing, electronic toll collection, quick crash removal, etc. The mechanism that the State DOTs and MPOs employ to explore these strategies is within their discretion. The USDOT will focus its resources, funding, staff and technology to cut traffic jams and relieve freight bottlenecks.

A few commenters reiterated that the congestion management process (CMP) should result in multimodal system performance measures and strategies. The FHWA and the FTA note that existing language reflects the multimodal nature of the CMP. Existing language (§ 450.320(a)(2)) specifically allows for the appropriate performance measures for the CMP to be determined cooperatively by the State(s), affected MPO(s), and local officials in consultation with the operators of major modes of transportation in the coverage area.

Most of the comments pointed out that the provisions of § 450.320(e) pertaining to projects that add significant new carrying capacity for Single Occupant Vehicles (SOVs) applies in "Carbon Monoxide (CO) and Ozone Nonattainment TMAs," but does not apply to TMAs in air quality maintenance areas. The FHWA and the FTA agree and have clarified the language in paragraph (e). We also clarified that this provision applies to projects "to be advanced with Federal funds."

Several commenters asked for a clarification regarding what CMP requirements apply in air quality maintenance and attainment areas, as opposed to the requirements in air quality nonattainment areas. The CMP requirements for all TMA areas (attainment, maintenance and nonattainment) are identified in § 450.320(a), § 450.320(b), § 450.320(c), and

§ 450.320(f). Additional CMP requirements that apply only to non-attainment TMA areas (for ozone and carbon monoxide) are identified in § 450.320(d) and § 450.320(e).

Another commenter asked for clarification regarding the exact requirements for a CMP and how the CMP is integrated with the metropolitan transportation plan. As noted above, the specific CMP requirements for all TMAs, regardless of air quality status, are identified in this section. The CMP [*7244] in this section is not described as, nor intended to be, a stand-alone process, but an integral element of the transportation planning process. To reinforce the integration of the CMP and the metropolitan transportation plan, § 450.322(f)(4) requires that the metropolitan transportation plan shall include "consideration of the results of the congestion management process in TMAs that meet the requirements of this subpart, including the identification of SOV projects that result from a congestion management process in TMAs that are nonattainment for carbon monoxide or ozone."

One commenter asked for examples of the reasonable travel demand reduction and operational management strategies as required in § 450.320(e). Examples of such strategies include, but are not limited to: Transportation demand management measures such as car and vanpooling, flexible work hours compressed work weeks and telecommuting; Roadway system operational improvements, such as improved traffic signal coordination, pavement markings and intersection improvements, and incident management programs; Public transit system capital and operational improvements; Access management program; New or improved sidewalks and designated bicycle lanes; and Land use policies/regulations to encourage more efficient patterns of commercial or residential development in defined growth areas.

Section 450.322 Development and Content of the Metropolitan Transportation Plan

There were over 160 separate comments on this section, mostly from MPOs and COGs, followed by national and regional advocacy organizations and State DOTs. A number of comments also came from public transportation providers with the remainder coming from local government agencies, the general public or other sources.

Several MPOs and COGs and national and regional advocacy organizations that commented on this section asked for clarification regarding the 20-year planning horizon in paragraph (a). The FHWA and the FTA want to provide MPOs flexibility on how to treat the metropolitan transportation plan at the time of a revision. The actual effective date of a metropolitan transportation plan update may be dependent upon several factors, including the intent of the MPO, the magnitude of the metropolitan transportation plan revision and whether conformity needs to be determined. To specifically indicate in the final rule when a "revision" may be considered a full "update" could result in limiting flexibility. For more information on this topic, refer to the "Definitions" section of this rule.

A small number of MPOs and COGs and national and regional advocacy organizations that commented on this section asked for clarification in paragraph (b) between long-range and short-range strategies. The FHWA and the FTA carried forward the language regarding short and long-range strategies from the October 1993 planning rule. Generally, long-range are those strategies and actions expected to be implemented beyond 10 years.

A small number of national and regional advocacy organizations also commented that the transportation demand referenced in paragraph (b) should be balanced with the environment and other factors. The FHWA and the FTA find that the balance with environmental concerns is adequately raised in other parts of the rule both in this section and in § 450.306 (Scope of the metropolitan transportation planning process).

A small number of MPOs that commented on this section wrote in support of paragraph (c) relating to the cycles for reviews and updates. The FHWA and the FTA note that this paragraph revises and supercedes the April 12, 2005, guidance on "Plan Horizons" allowing MPOs to "revise the metropolitan transportation plan at any time using the procedures in this section without a requirement to extend the horizon year."

A small number of State DOTs and national and regional advocacy organizations that commented on this section said in regard to paragraph (d) that the proposed language limits consultation between State air quality agencies and MPOs in ozone and carbon monoxide (CO) nonattainment and maintenance areas. Transportation control measures (TCMs) can apply to all pollutants so this section should refer to all types of nonattainment and maintenance areas.

Paragraph (d) addresses the MPO's coordination in the development of the TCMs in a SIP in ozone and CO nonattainment areas, pursuant to *49 U.S.C 5303(i)(3)*. The FHWA and the FTA are clarifying in the final rule the role of the MPO in the development of SIP TCMs, to be more consistent with the statute. Similar coordination is encouraged in the development of SIP TCMs in ozone and CO maintenance areas, as well as particulate matter and nitrogen dioxide nonattainment and maintenance areas. The FHWA and the FTA had proposed additional language in paragraph (d) that specified that the MPO, State air quality agency and the EPA must concur on the equivalency of any substitute TCM

before an existing SIP TCM is replaced under section 176(c)(8) of the Clean Air Act (*42 U.S.C. 7506(c)(8)*). After consultation with the EPA, this language was deemed unnecessary for the final planning regulations. The EPA has determined that revising the transportation conformity regulations is not necessary to implement the TCM substitution provision in Section 6011(d) of the SAFETEA-LU. The EPA believes that the new Clean Air Act provision contains sufficient detail to allow the provision to be implemented without further regulation. The EPA, the FHWA, and the FTA issued joint guidance on February 14, 2006, that describes how TCM substitutions can occur under the statute. n14

n14 This joint guidance entitled, "Interim Guidance for Implementing the Transportation Conformity Provisions in the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users," dated February 14, 2006, is available via the Internet at the following URL: *http://www.fhwa.dot.gov/environment/conformity/sec6011guidmemo.htm.*

A small number of State DOTs and a few MPOs and COGs that commented on this section said in regards to paragraph (e) that the requirement for "agreement" is too stringent. The FHWA and the FTA find that a "cooperative" planning process requires agreement among the major planning partners on what assumptions to adopt and what data and analyses to employ to forecast future travel demand. If a State or transit operator conducts a major planning study within the MPO planning boundaries, it is critical that the assumptions and data used in that planning study be considered valid by other planning partners and be consistent with data the MPO will employ to develop its travel models or otherwise develop growth projections in population, employment, land use, and other key factors that affect future travel demand. Both consultation and agreement on those assumptions/data are crucial to this process. However, the FHWA and the FTA also understand that the proposed text may be considered overly restrictive. We eliminated the phrase "the transportation plan update process shall include a mechanism for ensuring that * * * agree * * *" and replaced it with "the MPO, the State(s), and the public transportation operator(s) shall validate * * *" The FHWA and the FTA believe that the requirement "validate data" provides more flexibility than "including a mechanism." [*7245]

A number of MPOs and COGs that commented on this section asked for clarification in paragraph (f)(3) of the operational and management strategies. A small number of State DOTs support the proposed rule. Effective regional transportation systems management and operations requires deliberate and sustained collaboration and coordination between planners and managers of day-to-day operations across jurisdictions and between transportation and public safety agencies in order to improve the security, safety, and reliability of the transportation system. Coordination between transportation planning and operations helps ensure that regional transportation investment decisions reflect full consideration of all available strategies and approaches to meet regional transportation goals and objectives. Strengthening the coordination between these two processes and activities--planning and operations--can enhance both activities.

Because transportation systems management and operations is emerging as an important aspect of regional transportation planning, it is strongly encouraged that a set (or sets) of objectives be set forth in the metropolitan transportation plan for operational and management strategies that will lead to regional approaches, collaborative relationships, and funding arrangements for projects. Examples of operational and management strategies may include traffic signal coordination, traveler information services, traffic incident management, emergency response and homeland security, work zone management, freeway/arterial management, electronic payment services, road weather management, and congestion management. More specific examples on strategies related to congested locations can be found on the following Web site: *http://ops.fhwa.dot.gov/congestionmitigation/congestionmitigation.htm*, and additional information on freight bottlenecks is available at the following Web site: *http://www.fhwa.dot.gov/policy/otps/bottlenecks/index.htm.* The FHWA and the FTA intend to prepare guidance on operational and management strategies in the long-range statewide transportation plan and metropolitan transportation plan, including the development and use of objectives. The FHWA and the FTA have provided, and will continue to provide, technical information and guidance regarding operational and management strategies, if needed. However, we did not make any changes to this paragraph.

To encourage MPOs to address congestion in the metropolitan transportation plan, the following sentence was added to paragraph (f)(5): "The metropolitan transportation plan may consider projects and strategies that address areas or corridors where current or projected congestion threatens the efficient functioning of key elements of the metropolitan area's transportation system."

Some MPOs and COGs and a small number of State DOTs and the public that commented on this section had a variety of comments on paragraph (f)(6), ranging from requesting that it be eliminated to questioning the need for including existing facilities to the ability to provide sufficient detail to develop cost estimates in out years. This text is identical to the October 1993 planning rule. The FHWA and the FTA have found that providing the information required by

this paragraph in the metropolitan transportation plan provides valuable information to system operators, decision-makers and the general public, while not causing undue burden on the MPOs.

There were a large number and variety of comments on paragraph (f)(7). Some MPOs and COGs questioned the value of this paragraph or the ability to implement this provision, while a small number of national and regional advocacy organizations wrote in support of the paragraph. Some MPOs and COGs, national and regional advocacy organizations, and State DOTs, as well as a small number of public comments had questions or asked for clarification. Some MPOs and COGs, along with some State DOTs, suggested a text change to clarify the intent of the paragraph. Finally, a small number of comments came from national and regional advocacy organizations and Federal agencies recommending including an evaluation mechanism.

The FHWA and the FTA concur with the recommendation to change the text, to more closely mirror the intent of the statute (*23 U.S.C. 134(i)(2)(B)* and *49 U.S.C. 5303(i)(2)(B)*). We also concur that discussions of types of potential environment mitigation strategies need not be project specific, but should be at the policy or strategic level. We have made these changes to be consistent with the intent of the statute. A similar change has been made in § 450.214(j). The FHWA and the FTA have provided guidance, training, and technical assistance in this area and, if necessary, will provide additional efforts as needed so MPOs understand both how to address and the value of discussing types of potential mitigation activities as part of the metropolitan transportation plan. MPOs have the flexibility to develop and implement evaluation mechanisms that reflect the needs and complexity of the metropolitan area. While statute (*23 U.S.C. 134(k)(3)* and *49 U.S.C. 5303(k)(3)*) identifies evaluation in specific areas such as congestion, the FHWA and the FTA do not believe there is justification to develop a regulatory process that requires a systematic evaluation in other areas.

Also in regards to paragraph (f)(7), a Federal agency recommended requiring the consideration of avoidance measures to protect nationally significant resources. The FHWA and the FTA agree that consultation with appropriate Federal land and resource management agencies is essential during the development of metropolitan transportation plans to make the most efficient use of resources, since these agencies would need to be involved in the discussions of mitigation throughout the project development process. We believe that the regulatory language is sufficient to encourage such consultation and to foster discussions between the MPO and the Federal agencies to identify nationally significant resources and to consider actions and strategies to avoid and protect them. Therefore, no additional changes have been made to this paragraph.

There were a large number and variety of comments on paragraph (f)(10). Most of the State DOTs and many of the MPOs and COGs and national and regional advocacy organizations that commented on this section were against including operations and maintenance in the financial plan. Most of the State DOTs, many of the national and regional advocacy organizations, and some of the MPOs and COGs commented that the financial plan should not be extended to include "the entire transportation system" but should be limited to projects funded by the FHWA and the FTA. On the other hand, a small number of national and regional advocacy organizations supported requiring all projects be included. Finally, most of the State DOTs, MPOs and COGs, and many of the national and regional advocacy organizations suggested removing the reference to Appendix B.

When proposing Appendix B to the rule, the FHWA and the FTA intended to raise the level of awareness and importance in developing fiscally constrained transportation plans, TIPs, and STIPs to States, MPOs, and public transportation operators. Since its introduction under the ISTEA, fiscal constraint has remained a prominent [*7246] aspect of transportation plan and program development, carrying through to the TEA-21 and now to the SAFETEA-LU. The FHWA and the FTA acknowledge that Appendix B contains a combination of guidance, amplifying information and additional criteria. Given the level of controversy regarding Appendix B, it has been removed from the rule. Therefore, the sentence referencing Appendix B in paragraph (f)(10) has been deleted.

The FHWA and the FTA have divided paragraph (f)(10) into subparagraphs (i) through (viii) to make each provision easier to identify.

Many commenters questioned the requirement in new paragraph (f)(10)(i) that the financial plan must demonstrate the ability to adequately operate and maintain the entire transportation system. The FHWA and the FTA have revised § 450.322(f)(10) to delete the phrase "while operating and maintaining existing facilities and services." Instead, a new sentence was added to paragraph (f)(10) (now paragraph (f)(10)(i)) that reads: "For purposes of transportation system operations and maintenance, the financial plan shall contain system-level estimates of costs and revenue sources that are reasonably expected to be available to adequately operate and maintain Federal-aid highways (as defined by *23 U.S.C. 101(a)(5)*) and public transportation (as defined by title 49 U.S.C. Chapter 53)." Please see the responses to the comments on Appendix B for additional background information and explanation.

A new paragraph (f)(10)(ii) discusses cooperative development of estimates of funds. No change was made to this discussion.

A new paragraph (f)(10)(iii) discusses additional financing strategies in the metropolitan transportation plan. No change was made to this discussion.

A new paragraph (f)(10)(iv) discusses the projects and strategies to be included in the financial plan. The FHWA and the FTA find that certain features of Appendix B merit inclusion in the rule. One of these features is the requirement for revenue and cost estimates to use an inflation rate(s) to reflect year of expenditure dollars (to the extent practicable). We have added a sentence to paragraph (f)(10)(iv) that reads: "Starting December 11, 2007, revenue and cost estimates that support the metropolitan transportation plan must use an inflation rate(s) to reflect "year of expenditure dollars," based on reasonable financial principles and information, developed cooperatively by the MPO, State(s), and public transportation operator(s)." This language expresses the desire of the FHWA and the FTA for revenue and cost estimates to be reflected in "year of expenditure dollars." We recognize that it might take some time for State DOTs and MPOs to convert their metropolitan transportation plans, STIPs and TIPs to reflect this requirement. Therefore, we will allow a grace period until December 11, 2007, during which time State DOTs and MPOs may reflect revenue and cost estimates in "constant dollars." After December 11, 2007, revenues and cost estimates must use "year of expenditure" dollars. This requirement is consistent with the January 27, 2006, document "Interim FHWA Major Project Guidance." n15 Please see the responses to the comments on Appendix B for additional background information and explanation.

n15 This document, "Interim FHWA Major Project Guidance," dated January 27, 2006, is available via the internet at the following URL: *http://www.fhwa.dot.gov/programadmin/mega/012706.cfm.*

A new paragraph (f)(10)(v) presents additional information from Appendix B. The FHWA and the FTA believe that this optional provision will give MPOs maximum flexibility to broadly define a large-scale transportation issue or problem to be addressed in the future that does not predispose a NEPA decision, while, at the same time, calling for the definition of a future funding source(s) that encompasses the planning-level "cost range/cost band." Please see the responses to the comments on Appendix B for additional background information and explanation.

A new paragraph (f)(10)(vi) addresses nonattainment and maintenance areas.

A new paragraph (f)(10)(vii) reinforces that the financial plan is not required to include illustrative projects.

Many State DOTs, MPOs and COGs as well as some national and regional advocacy organizations and a few public transportation providers and local government agencies asked for clarification on fiscal constraint if the financial situation in the State or metropolitan region changes. The FHWA and the FTA have added paragraph (f)(10)(viii) to clarify situations where a revenue source is removed or substantially reduced after the FHWA and the FTA find a metropolitan transportation plan to be fiscally constrained.

All references to Appendix B have been removed from this section because Appendix B is not a part of this rule.

Some national and regional advocacy organizations and a small number of MPOs and COGs and Federal agencies provided comments on paragraph (g) regarding changing the "or" between paragraphs (g)(1) and (g)(2) to "and". A small number of the comments, including some by a Federal agency, also related to adding specific agencies or processes to the text. The FHWA and the FTA acknowledge that the text is different from similar text for statewide planning in § 450.214(i). However, both sections are consistent with statute. (See (*23 U.S.C. 134(i)(4)(B)* and *49 U.S.C. 5303(i)(4)(B)*) and (*23 U.S.C. 135(f)(2)(D)* and *49 U.S.C. 5304(f)(2)(D)*). The FHWA and the FTA also note that there is flexibility in the rule language. The "or" does not prevent an MPO from carrying out (g)(1) and (g)(2). At the same time, the term "as appropriate" allows an MPO to carry out only (g)(1) or (g)(2) in certain circumstances. No changes were made to this paragraph to remain consistent with statutory language.

Most of the MPOs and COGs provided comments on paragraph (h) ranging from removing any reference to security to clarifying the MPO role in security to text changes. A few State DOTs and public transportation providers provided a range of comments as well. The FHWA and the FTA acknowledge the potential for concern and confusion in an emerging area such as transportation security. We have added the phrase "(as appropriate)" to this paragraph to provide additional flexibility in this emerging area and to respect the sensitive nature of homeland security issues. We also want to reiterate that placing the inclusion of policies that support homeland and personal security in the same sentence with safety should in no way detract from the recognition that safety and security are separate considerations in the planning process. If necessary, the FHWA and the FTA will provide subsequent guidance and technical resources on incorporating policies supporting homeland and personal security.

Several commenters noted that the reference in paragraph (k) was incorrect. This reference has been changed to accurately refer to paragraph (f)(10).

The FHWA and the FTA note, based on coordination with the EPA, that the interim metropolitan transportation plan and TIP referenced in paragraph (1) and in § 450.324(m) respectively allows the use of interim metropolitan transportation plans and TIPs during a conformity lapse so that exempt projects, transportation control measures in approved State implementation plans, and previously approved projects and/or project phases can be funded when a conformity determination lapses. In addition, we have clarified that the "interagency [*7247] consultation" referenced in paragraph (1) is "defined in 40 CFR part 93."

After further review, the FHWA and the FTA have determined it is necessary to clarify paragraph (l) regarding eligible projects that may proceed without revisiting the requirements of this section. We have added "or consistent with" to this paragraph to clarify that eligible projects (e.g., exempt projects under *40 CFR 93.126*) do not need to be explicitly listed in the conforming transportation plan and TIP to proceed.

Section 450.324 Development and Content of the Transportation Improvement Program (TIP)

The docket included more than 50 documents that contained more than 125 comments on this section with about one-quarter from State DOTs, one-quarter from national and regional advocacy organizations, one-half from MPOs and COGs, and the rest from city/county/State agencies and transit agencies. A few MPOs and COGs, many State DOTs and a few national and regional advocacy organizations said in regards to paragraph (a) that MPOs should be allowed to have a TIP of more than four years where the additional year(s) are not illustrative.

The four-year scope is consistent with the time period required by the SAFETEA-LU. MPOs may show projects as illustrative after the first four years as well as in the metropolitan transportation plan. While MPOs are not prohibited from developing TIPs covering a longer time period, the FHWA and the FTA can only recognize and take subsequent action on projects included in the first four years of the TIP. Therefore, no change was made to this paragraph of the rule in response to these comments. However, paragraph (a) was modified to be consistent with clarifications to the definitions of "revision" and "amendment."

When proposing Appendix B to the rule, the FHWA and the FTA intended to raise the level of awareness and importance in developing fiscally constrained transportation plans, TIPs, and STIPs to States, MPOs, and public transportation operators. Since its introduction under the ISTEA, fiscal constraint has remained a prominent aspect of transportation plan and program development, carrying through to the TEA-21 and now to the SAFETEA-LU. The FHWA and the FTA acknowledge that Appendix B contains a combination of guidance, amplifying information and additional criteria. Given the level of controversy regarding Appendix B, it has been removed from the rule. Therefore, the sentence referencing Appendix B in paragraph (i) has been deleted.

We have changed paragraph (c) to allow the inclusion of the exempted projects, but not requiring that they be included. We removed the phrase "federally supported" from the beginning of this paragraph because it is redundant. The paragraph already requires projects to be included if they are funded under title 23 U.S.C., and title 49 U.S.C. Chapter 53. Further, we have added "Safety projects funded under *23 U.S.C. 402*" to paragraph (c)(1). This change is consistent with the October 1993 planning rule.

Many State DOTs and several national and regional advocacy organizations commented in regard to paragraph (d) (now paragraph (e)), that they should not have to demonstrate financial constraint for projects included in the TIP funded with non-FHWA and non-FTA funds. However, the proposed requirement is consistent with and carries forward the requirement that was implemented with the October 1993 planning rule. In addition, for informational purposes and air quality analysis in nonattainment and maintenance areas, regionally significant non-Federal projects shall be included in the TIP. Therefore, the FHWA and the FTA have retained this portion of paragraph (d). We have, however, simplified the paragraph slightly to combine the last two sentences.

A few comments were received from national and regional advocacy organizations and MPOs stating that paragraph (e)(1) would be enhanced by adding language that the information included in the TIP for each project needs to be understandable by the general public. This requirement remains unchanged from the October 1993 planning rule. Since that time, we have noted little public confusion over the information included in TIPs identifying projects or phases. We believe the MPO participation plan process offers opportunities for the public to clarify confusion in specific cases. No change was made to the rule.

Most State DOTs, MPOs and COGs and national and regional advocacy organizations that commented on this section, recommended in regards to paragraph (e), that after the first year of the TIP, only "likely" or "possible" (rather than "proposed") categories of funds should be identified by source and year. The FHWA and the FTA agree with this suggestion, with the exception of projects in nonattainment and maintenance areas for which funding in the first two years must be available or committed. Paragraph (e)(3) has been changed to specifically reference the amount of "Federal funds" proposed to be obligated and to identify separate standards for the first year and for the subsequent years of the TIP.

Most of the comments on paragraph (h) pertained to the question posed in the preamble of the NPRM regarding whether the FHWA and the FTA should require MPOs submitting TIP amendments to demonstrate that funds are "available or committed" for projects identified in the TIP in the year the TIP amendment is submitted and the following year. Almost all opposed this suggestion believing that it would require reviewing the financial assumptions for the entire program, thereby causing an undue burden. Commenters suggested showing financial constraint only for the incremental change. The FHWA and the FTA are concerned for the potential impact of individual amendments on the funding commitments and schedules for the other projects in the TIP. For this reason, the financial constraint determination occasioned by the TIP amendment will necessitate review of all projects and revenue sources in the TIP. The FHWA and the FTA will address any concerns on this issue through subsequent guidance. Further, the FHWA and the FTA are concerned that amendments that do not include available and committed funds for the year of the amendment and the following year will reduce the credibility with decision-makers and the public that projects will be able to move forward in a timely manner. Given the comments on this issue, we have not made a change to the rule. The FHWA and the FTA will address any concerns on this issue through subsequent guidance.

As discussed in the response to the comments on Appendix B, we have added to paragraph (h), "for purposes of transportation operations and maintenance, the financial plan shall contain system-level estimates of costs and revenue sources that are reasonably expected to be available to adequately operate and maintain Federal-aid highways (as defined by *23 U.S.C. 101(a)(5)*) and public transportation (as defined by title 49 U.S.C. Chapter 53)." In addition, to reinforce that the financial plan is not required to include illustrative projects, we have added the phrase "but is not required to" to this discussion. We have added one additional feature from Appendix B: "year of expenditure dollars." We have added the following sentence to paragraph (h): Starting December 11, 2007, revenue and cost estimates for the TIP must use an inflation rate(s) to [*7248] reflect "year of expenditure dollars," based on reasonable financial principles and information, developed cooperatively by the MPO, State(s), and public transportation operator(s). This language expresses the desire of the FHWA and the FTA for revenue and cost estimates to be reflected in "year of expenditure dollars." We recognize that it might take some time for State DOTs and MPOs to convert their metropolitan transportation plans, STIPs and TIPs to reflect this requirement. Therefore, we will allow a grace period until December 11, 2007, during which time State DOTs and MPOs may reflect revenue and cost estimates in "constant dollars." After December 11, 2007, revenues and cost estimates must use "year of expenditure" dollars. This requirement is consistent with the January 27, 2006, document "Interim FHWA Major Project Guidance." n16 The reference to Appendix B has been deleted since Appendix B is not included with this rule. Please see the responses to the comments on Appendix B for additional background information and explanation.

n16 This document, "Interim FHWA Major Project Guidance," date January 27, 2006, is available via the internet at the following URL: *http://www.fhwa.dot.gov/programadmin/mega/012706.cfm.*

Many State DOTs, national and regional advocacy organizations and a few MPOs and COGs questioned having to demonstrate their ability to adequately operate and maintain the entire transportation system. They were concerned that State DOTs, MPOs, and public transportation operators should not be responsible for demonstrating available funds for projects outside of federally supported facilities. The FHWA and the FTA have revised paragraph (i) to change the phrase "while the entire transportation system is being adequately operated and maintained" to "while federally supported facilities are being adequately operated and maintained." We have also removed the reference to "by source" and the reference to additional information in Appendix B, since Appendix B has been removed from this rule. Please see the responses to the comments on Appendix B to the NPRM for additional background information and explanation.

A few comments were received opposing the requirement in paragraph (j)(1) (now paragraph (l)(1)) for the TIP to identify the criteria and process for prioritizing implementation of transportation plan elements for inclusion in the TIP. The FHWA and the FTA find that if it is difficult for the MPO to identify or capture the criteria it used to select projects, it will be even more difficult for the general public to understand the rationale behind selecting one element from the transportation plan over another. Therefore, we retained the language in paragraph (l)(1). However, in reviewing this comment, we identified two paragraphs from the October 1993 planning rule (*23 CFR 450.324(l)* and (m)) that were not

included in the NPRM, related to this issue. To clarify and emphasize that MPOs should identify criteria and a process for prioritizing transportation plan elements for inclusion in the TIP, we have added these two paragraphs to the rule as new paragraphs (j) and (k), respectively. These paragraphs identify the need for allocation of funds based on prioritization and explicitly prohibit suballocation based on pre-determined percentages of formulas.

The FHWA and the FTA note, based on coordination with the EPA, that the interim metropolitan transportation plan and TIP referenced in § 450.322(1) and in paragraph (k) (now paragraph (m)) of this section respectively allows the use of interim plans and TIPs during a conformity lapse so that exempt projects, transportation control measures in approved State implementation plans, and previously approved projects and/or project phases can be funded when a conformity determination lapses. We have added "conformity" to the first sentence to specify the "lapse" referenced and removed the phrase "(as defined in 40 CFR part 93)" because it is no longer necessary.

After further review, the FHWA and the FTA have determined it is necessary to clarify paragraph (k) (now paragraph (m)) regarding eligible projects that may proceed without revisiting the requirements of this section. We have added the phrase "or consistent with" to this paragraph to clarify that eligible projects (e.g., exempt projects under *40 CFR 93.126*) do not need to be explicitly listed in the conforming transportation plan and TIP to proceed.

Many State DOTs, MPOs and COGs as well as some national and regional advocacy organizations and a few public transportation providers and local government agencies asked for clarification on fiscal constraint if the financial situation in the State or metropolitan region changes. The FHWA and the FTA have added a new paragraph (o) to clarify situations where a revenue source is removed or substantially reduced after the FHWA and the FTA find a STIP to be fiscally constrained.

Several comments asked for clarification between the phrases "operation and maintenance" and "operation and management." See the discussion of § 450.104 (Definitions) for an explanation of these terms.

The FHWA and the FTA received a proposal identifying additional procedures for engaging private transportation operators in planning and program delivery. We recognize the importance of private operator participation and, if necessary, will provide technical assistance to MPOs to promote effective practice, but do not believe any changes to the rule are necessary.

Section 450.326 TIP Revisions and Relationship to the STIP

The docket included 21 documents that contained more than 25 comments on this section with about one-third from State DOTs, half from MPOs and COGs, and the rest from city/county/State agencies, as well as national and regional advocacy organizations.

One county, many of the MPOs and COGs and State DOTs, and most of the national and regional advocacy organizations submitted opposition to the statement in paragraph (a) that public participation procedures consistent with § 450.316(a) shall be utilized in revising the TIP, except that these procedures are not required for administrative modifications that only involve projects of the type covered in § 450.324(f). Because the rule does not require an MPO to undertake any particular public involvement process for an administrative modification, an MPO may delineate its own public involvement process for administrative modifications within the public participation plan. In order to clarify these issues, the FHWA and the FTA have removed the phrase "projects of the type covered in § 450.324(f)" from paragraph (a).

Many of the MPOs and COGs and most of the State DOTs opposed the statement in paragraph (a) that "in all areas, changes that affect fiscal constraint must take place by amendment of the TIP." The FHWA and the FTA realize that there are minor funding changes to projects that a region could determine would fall under the definition of "administrative modifications," and these would not need to go through the full TIP amendment process. However, the FHWA and the FTA include this requirement because any change which requires an amendment has ripple effects throughout the program and thus should be subjected to the full disclosure of a TIP amendment. [*7249] Therefore, no change has been made to the paragraph in response to this comment.

Half of the MPOs and COGs and half of the national and regional advocacy organizations oppose the language in paragraph (a) that states: "In nonattainment or maintenance areas for transportation-related pollutants, if the TIP is amended by adding or deleting non-exempt projects (per 40 CFR part 93), or is replaced with an updated TIP, the MPO, and the FHWA and the FTA must make a new conformity determination." The sentence has been revised to clarify that the transportation conformity rule (*40 CFR 93.104(c)(2)*) requires a transportation conformity determination be made if a TIP amendment involves non-exempt projects. If a non-exempt project has already been incorporated into a regional

emissions analysis and is merely moving from the currently conforming metropolitan transportation plan to the TIP (and is not crossing an analysis year) we agree that the conformity determination on the TIP can be based on a previous regional emissions analysis if the requirements of *40 CFR 93.122(g)* are met. No additional changes were made to this paragraph.

Section 450.328 TIP Action by the FHWA and the FTA

The docket included approximately 20 documents that contained more than 20 comments on this section with about three-fifths from State DOTs, one-fourth from national and regional advocacy organizations, and the rest from city/county/State agencies and MPOs and COGs.

An MPO expressed concern that paragraph (a) was too vague and open-ended. In addition, several commenters expressed concern regarding the need for approval of the TIP when submitted to the FHWA and the FTA. The FHWA and the FTA do not approve the TIP. The language in this paragraph is consistent with the language in the October 1993 planning rule. Over nearly 13 years, we have not found significant confusion regarding this language. However, we did remove "including amendments thereto" from this paragraph since we the FHWA and the FTA do not make findings on amendments.

After consultation with the EPA, we have revised paragraph (c) to be consistent with Clean Air Act requirements and clarify that projects may only be advanced once the plan expires if the TIP was approved and found to conform prior to the expiration of the metropolitan transportation plan and if the TIP meets the TIP update requirements of § 450.324(a).

Many comments were received questioning why the existing flexibility to allow highway operating funds to be approved even if not in the TIP was eliminated from paragraph (f) and in § 450.218 (Self certification, Federal findings and Federal approvals). This was an erroneous omission in the NPRM and the language has been changed to correct this error.

Section 450.330 Project Selection From the TIP

The docket included 33 documents that contained more than 35 comments on this section with about one-third from State DOTs, one-eighth from national and regional advocacy organizations, half from MPOs and COGs, and the rest from city/county/State agencies and transit operators.

Most of the comments pertained to the two questions posed in the preamble to the NPRM: (1) Whether MPOs should be required to prepare an "agreed to" list of projects at the beginning of each of the four years in the TIP, rather than only the first year; and (2) whether a TIP amendment should be required to move a project between years in the TIP, if an "agreed to" list is required for each year. The predominant opinion was that requiring a State DOT or MPO to submit an agreed to list at the beginning of each of the four years of the TIP/STIP or requiring an amendment to move projects between years in the TIP/STIP unnecessarily limits flexibility, and thus should not be a requirement. The FHWA and the FTA agree with the majority of the comments. Therefore, no change was made to the rule language.

A few MPOs requested guidance on why a distinction is made between projects that are selected by the State in cooperation with the MPO and those that are selected by the MPO in consultation with the State and public transportation operators. This language is consistent with the October 1993 planning rule and is based on language in the statute (*23 U.S.C. 135(b)* and *49 U.S.C. 5304(b)* and *23 U.S.C. 134(c)* and *49 U.S.C. 5303(c)*, respectively). Therefore, no change was made to the rule language.

A few MPOs noted that paragraph (b) uses "consultation" to describe the MPO/TMA's action with the State and transit agency, whereas, "cooperation" is used to describe the State's action with the MPO. This language is consistent with the October 1993 planning rule and is based on language in the statute ((*23 U.S.C. 135(b)* and *49 U.S.C. 5304(b)* and *23 U.S.C. 134(c)* and *49 U.S.C. 5303(c)*, respectively). Therefore, no change was made to the rule language.

Section 450.332 Annual Listing of Obligated Projects

The docket included more than 20 documents that contained about 40 comments on this section with about one-eighth from State DOTs, one-fifth from national and regional advocacy organizations, half from MPOs and COGs, and the rest from city/county/State agencies and transit operators.

Half of the comments on this section pertained to the language that requires the annual listing needs to be published no later than 90 calendar days following the end of the State program year. All of the responses suggested that using the end of the Federal fiscal year would make more sense. The FHWA and the FTA appreciate the suggestion. We have changed the language to not specify "State program year" or "Federal fiscal year." Instead, the MPO, State, public transportation operator(s) shall determine the "program year." The annual listing of obligated projects shall be developed no later than 90 calendar days following the end of the program year.

Critical information needed for this report is available in FHWA's Fiscal Management Information System (FMIS) n17 and FTA's Transportation Electronic Award and Management (TEAM) n18 System databases. Many of the MPOs and many of the national and regional advocacy organizations requested that they be provided access to these databases, or provided timely reports of the data from the FHWA and the FTA. The FHWA and the FTA will work closely with the States, public transportation operators and the MPOs [*7250] to ensure all of the critical data is available to successfully meet this reporting requirement. However, the FHWA and the FTA do not believe that the rule needs to be changed to address this comment.

n17 The FHWA administers a nationwide highway project reporting system, the Fiscal Management Information System (FMIS), that is used to provide oversight of over $ 30 billion in disbursements to States for Federal-aid highway projects. FMIS prescribes project reporting policy and procedures and maintains the official project obligation records and statistical data for the various highway programs, including the planning and administration of a nationwide highway project reporting system on the progressive stages of individual highway projects. The system provides information to the FHWA and U.S. DOT management, State transportation officials, other Federal agencies, and the Congress.

n18 In an effort to help manage funds that support some of the FTA collaborative activities, the FTA has developed the Transportation Electronic Award and Management (TEAM) system. TEAM is a system designed to manage and track the grant process. FTA staff use TEAM to assess grant availability, assess and approve projects, assign project numbers, allocate and approve funding, and view approved grantee projects and associate reports. FTA staff members also use TEAM to track the processes associated with these activities. In addition, grantees and potential grantees use TEAM to request grants and track grant progress.

Some MPOs and several State DOTs expressed support for including bicycle and pedestrian projects in the annual listing. However, many commenters did not want to include a listing of all bicycle and pedestrian "investments" in the report because many bicycle and pedestrian investments are included within larger transit or highway projects. No changes were made to the rule because the language reflects what is included in the statute (*23 U.S.C. 134(j)(7)(B)* and *49 U.S.C. 5303(j)(7)(B)*) The FHWA and the FTA expect the projects included in the Annual Listing of Obligated Projects to be consistent with the projects that are listed in the TIP. It was suggested that the annual listing of obligated projects contain only fund obligations and not provide information duplicative of that published in the TIP. Because the annual listing of obligated projects is intended to improve the transparency of transportation spending decisions to the public, and because providing TIP information enhances the user-friendliness of the document, the FHWA and FTA have decided not to change the content requirements. On February 24, 2006, the FHWA and the FTA jointly issued preliminary guidance on the annual list of obligated projects. n19

n19 This document, "Preliminary SAFETEA-LU Guidance--Annual List of Obligated Projects, dated February 24, 2006, is available via the internet at the following URL: *http://www.fhwa.dot.gov/hep/annuallistemail.htm.*

Section 450.334 Self-Certifications and Federal Certifications

The docket included about 10 documents that contained about 10 comments on this section with about one-half from national and regional advocacy organizations, one-half from MPOs and COGs, and the rest from city/county governments.

Several comments pertained to the four-year cycle for Federal certification reviews of TMAs compared to the annual self-certification required by all MPOs and State DOTs. There was some concern that the annual self-certifications should not be required if the FHWA and the FTA have just performed their Federal certification review. The regulations require the State and all MPOs to certify annually that they are carrying out the transportation planning process to ensure that the State and MPOs understand their transportation responsibilities and to ensure that their responsibilities are actually being met. This self-certification must affirm that the transportation planning process is conducted in accordance with all applicable requirements.

The MPO self-certifications and the FHWA/FTA Federal certification reviews of TMAs are related, yet distinct requirements. The Federal certification of TMAs is a statutory requirement, while MPO self-certifications are a regulatory requirement that apply to all MPOs and State DOTs. Both the FHWA/FTA (for the Federal certification) and the MPO (for the self-certification) must meet their individual requirements. While both may occur in the same year, the FHWA and the FTA note that some of the information pulled together by the MPO(s), State(s), and public transportation operator(s) in advance of the TMA certification review could be "re-used" in making the self-certification. Therefore, no change has been made to the rule.

One commenter requested that the FHWA and the FTA include a specific standard for compliance with private enterprise provisions, which now are excluded from consideration in TMA certification, and improve a private provider's ability to operate in metropolitan areas. Several commenters requested the inclusion of detailed methodologies for engaging private service providers in the transportation planning process, as well as standards for ascertaining compliance with private enterprise provisions and a complaint process.

To ensure maximum flexibility for localities to tailor private sector involvement procedures to the service providers and needs of their areas, we have determined that this information should be disseminated as non-regulatory guidance, complemented by a wide array of effective practice case studies and supported by training and technical assistance.

The FHWA and the FTA have updated the list of applicable requirements in paragraph (a). Reference to "23 CFR parts 200 and 300" has been removed from paragraph (a)(3). Instead, a more specific reference to "23 CFR part 230, regarding implementation of an equal employment opportunity program on Federal and Federal-aid highway construction contracts" was added as paragraph (a)(6). This is the specific portion of 23 CFR parts 200 and 300 that needs to be reviewed and is not related to Title VI of the Civil Rights Act of 1964 in paragraph (a)(3). In addition, we have added a new paragraph (a)(4): "*49 U.S.C. 5332*, prohibiting discrimination on the basis of race, color, creed, national origin, sex, or age in employment or business opportunity." Upon further review of this section, the FHWA and the FTA determined that *49 U.S.C. 5332* should be included in this list of requirements.

A small number of national and regional advocacy organizations expressed concern that the rule does not provide enough detail on the standards that the FHWA, the FTA, State DOTs and MPOs should apply in certification reviews. We believe that the entire context of the rule and of the statute sufficiently identify the criteria to be used in certifying that the transportation planning process meets or substantially meets these requirements. We do not believe additional detail is required in the rule. However, the FHWA and the FTA will provide non-regulatory guidance, training and technical assistance, if necessary.

Section 450.336 Applicability of NEPA to Metropolitan Transportation Plans and Programs

The docket included very few comments on this section. One concern expressed that this section or Appendix A would make planning reviewable under NEPA. The purpose of this section, however, is to reiterate the statutory authority that the metropolitan transportation planning process decisions are not subject to review under NEPA. We have changed this section to mirror the language in *23 U.S.C. 134(p)* and *49 U.S.C. 5303(p)*.

Section 450.338 Phase-In of New Requirements

The docket included about 40 documents that contained about 110 comments on this section with about one-third from State DOTs, one-fifth from national and regional advocacy organizations, half from MPOs and COGs, and the rest from city/county/State agencies.

All comments received indicated that it will be difficult to meet the SAFETEA-LU July 1, 2007, deadline. Subsequent to the preparation of the proposed rule, but prior to its publication, the FHWA and the FTA disseminated additional guidance regarding the phase-in requirements on May 2, 2006. n20 Many of the comments to the docket addressed issues that were clarified in our May 2, 2006, guidance. The provisions of the guidance have been incorporated in the regulation. Specifically, we have clarified that [*7251] transportation plans and TIPs adopted and approved prior to July 1, 2007, may be developed under TEA-21 requirements of the provisions and requirements of this part.

n20 This guidance, "SAFETEA-LU Deadline for New Planning Requirements (July 1, 2007)," dated May 2, 2006, is available via the internet at the following URL: *http://www.fhwa.dot.gov/hep/plandeadline.htm.*

We have also clarified, in paragraph (a), what actions may be taken prior to July 1, 2007, on long-range statewide transportation plans and STIPs.

One MPO, half of the national and regional advocacy organizations, and a quarter of the State DOTs commented that the regulations should clearly state that partial STIP approvals are allowable if one MPO or region is not SAFETEA-LU compliant, the other regions could produce a partial STIP that is compliant. Because the regulation allows for approval of partial STIPs (see § 450.218(b)(1)(iii)), no change was made to the regulation. Approval of partial STIPs are acceptable, primarily when difficulties are encountered in cooperatively developing the STIP portion for a particular metropolitan area or for a Federal Lands agency. If an MPO is able to produce a TIP that is SAFETEA-LU compliant, the Federal action would be to amend that TIP into the STIP, making the portion of the STIP that covers that region SAFETEA-LU compliant.

Most of the national and regional advocacy organizations and several State DOTs commented that the deadline for transportation plan, STIP and TIP action should apply to State/MPO approval action rather than the FHWA/FTA conformity finding. The FHWA and the FTA issued guidance "Clarification of Plan Requirements in Nonattainment and Maintenance Areas" on this issue on May 25, 2001. n21 The language in the rule is consistent with the conformity rule and current practice. Therefore, no change was made.

n21 This document, "Clarification of Plan Requirements in Nonattainment and Maintenance Areas," dated May 25, 2004, is available via the internet at the following URL: *http://www.fhwa.dot.gov/environment/conformity/planupm.htm.*

Most of the commenters stated that *23 U.S.C. 135(b)* requires only "updates" to reflect changes required by the SAFETEA-LU, not "amendments." The comments noted that requiring a STIP re-adoption for minor amendments would be a substantial burden and is a stricter interpretation of the statute than Congress intended. Prior to the adoption of this rule, there has not been an accepted definition of or distinction between the terms "update" or "amendment." As established in this rule, the FHWA and the FTA consider an amendment to the STIP to be a major change to the transportation plan or program. The FHWA and the FTA believe that any major change to the transportation plan or program, whether called an "amendment" or an "update" under this regulation, is considered for this purpose an "update" as referenced in *23 U.S.C. 135(b)*. However, an "administrative modification" would not be covered by this requirement. This rule will clarify the definition of these terms for the future.

One national and regional advocacy organization stated that Congress specified that the SAFETEA-LU phase-in period should begin on July 1, 2007, not be completed by that date. The FHWA and the FTA believe that this is an incorrect interpretation of the statute. The FHWA and the FTA agree that administrative modifications can be made to TIPs after July 1, 2007, but amendments or revisions that would add or delete a major new project to a TIP, STIP, or transportation plan would not be acceptable after July 1, 2007 in the absence of meeting the provisions and requirements of this part. This information has been included in paragraph (d). In addition, we have clarified in paragraph (d) that, on or after July 1, 2007, both amendments and updates must be based on the provisions and requirements of this part.

Appendix A--Linking the Transportation Planning and NEPA Processes

As mentioned, the FHWA and the FTA received more than 60 comments on this section with about one-third from MPOs and COGs and one-third from State DOTs. National and regional advocacy organizations, transit agencies and others provided the remaining third of the comments on this section. In general, most of the comments received supported the concept of linking planning and NEPA but opposed including Appendix A in the rule.

The purpose of an Appendix to a regulation is to improve the quality or use of a rule, without imposing new requirements or restrictions. Appendices provide supplemental, background or explanatory information that illustrates or amplifies a rule. Because Appendix A provides amplifying information about how State DOTs, MPOs, and public transportation operators can choose to conduct planning level choices and analyses so they may be adopted or incorporated into the process required by NEPA, but does not impose new requirements, the FHWA and the FTA find that Appendix A is useful information to be included in support of §§ 450.212 (Transportation planning studies and project development), 450.222 (Applicability of NEPA to statewide transportation plans and programs), 450.318 (Transportation planning studies and project development) and 450.336 (Applicability of NEPA to metropolitan transportation plans and programs).

The FHWA and the FTA recognize commenters' concerns about Appendix A, including the recommendation that this information be kept as guidance rather than be made a part of the rule. First, information in an Appendix to a regulation does not carry regulatory authority in itself, but rather serves as guidance to further explain the regulation. Secondly, as stated above, Section 1308 of TEA-21 required the Secretary to eliminate the MIS as a separate requirement, and promulgate regulations to integrate such requirement, as appropriate, as part of the transportation planning process.

Appendix A fulfills that Congressional direction by providing explanatory information regarding how the MIS requirement can be integrated into the transportation planning process. Inclusion of this explanatory information as an Appendix to the regulation will make the information more readily available to users of the regulation, and will provide notice to all interested persons of the agencies' official guidance on MIS integration with the planning process. Attachment of Appendix A to this rule will provide convenient reference for State DOTs, MPOs and public transportation operator(s) who choose to incorporate planning results and decisions in the NEPA process. It will also make the information readily available to the public. Additionally, the FHWA and the FTA will work with Federal environmental, regulatory, and resource agencies to incorporate the principles of Appendix A in their day-to-day NEPA policies and procedures related to their involvement in highway and transit projects. For the reasons stated above, after careful consideration of all comments, the FHWA and the FTA have decided to attach Appendix A to the final rule as proposed in the NPRM.

Based on the comments, the FHWA and the FTA thoroughly reviewed Appendix A and have made several changes discussed below.

A note was added to the beginning of the discussion to emphasize that the Appendix provides additional information, is non-binding and should not be construed as a rule of general applicability.

For clarification, we made small changes to some of the subheadings. Section I "Procedural" was changed to "Procedural Issues" and Section II [*7252] "Substantive" was changed to "Substantive Issues."

We expanded the agencies listed in the response to Question 1. The response now references "MPO, State DOT, or public transportation operator."

No changes were made to Question 2.

In the second paragraph of the response to Question 3, we clarified the term "lead agency." The sentence now reads "For example, the term 'lead agency' collectively means the U.S. Department of Transportation and a State or local governmental entity serving as a joint lead agency for the NEPA process."

In the response to Question 4, we clarified that the lead agencies, rather than the FHWA and the FTA, are responsible for making decisions. Also, in the first sentence, we emphasize that the lead agencies "jointly decide, and must agree * * *"

No changes were made to Question 5.

In the response to Question 6, a small change to add the phrase "those of" was made to the examples listed in the first paragraph.

We changed the order of the phrases in the second bullet of the response to Question 7 to emphasize that the transportation planning process (and the future policy year assumptions used) would occur before the NEPA process. We also added "and the public" to the eighth bullet. The public and other agencies should have access to the planning products during NEPA scoping.

In Question 8, we added "during NEPA scoping and" to the sentence "The use of these planning-level goals and choices must be appropriately explained during NEPA scoping and in the NEPA document" to clarify that agencies must identify during the NEPA scoping process their intent to use planning-level decisions.

We clarified in Question 9 what happens during the first-tier EIS process. The second-tier NEPA review(s) would be performed in the usual way. We also added "planning" to "subarea planning study" to emphasize that information in this Appendix refers to planning level studies. Finally, we clarified that we are referencing the "mandatory" Alternatives Analysis process for transit projects.

We have deleted the second paragraph in the response to Question 10. This paragraph suggested even more detailed decisions could be developed and considered during the planning process. Based on the comments we received, we want the Appendix to focus on planning-level decisions.

In the response to Question 11, we simplified the language in the first paragraph.

In the response to Question 12, the reference to "affected agencies" was changed to "participating agencies" to be specific regarding which agencies should have access to the analyses or studies.

In the response to Question 13, "special area management plans" was added to paragraph (f). In addition, "or current" was added to the phrase "the assessment of affected environment and environmental consequences conducted dur-

ing the transportation planning process will not be detailed or current enough to meet NEPA standards" to emphasize that these assessments may need to be revisited during NEPA if time has passed between the time when the planning study was completed and the NEPA study.

No change was made to Question 14.

In Question 15, we added "mitigation" before "banking" to be more specific.

No change was made to Question 16.

No change was made to Question 17.

In the response to Question 18, we added "and its successor in SAFETEA-LU Section 6002" to update the discussion in the first paragraph.

No change was made to Question 19.

We updated the Website addresses in the "Additional Information on this Topic" section.

A small number of national and regional advocacy organizations objected to Appendix A because it does not require consideration of mitigation to the level, extent and detail required for NEPA. This comment seems to reflect a misunderstanding of the intent of Appendix A. Although Appendix A is designed to provide clarifying information on how the transportation planning process could produce products that can be more readily used in the NEPA process, transportation planning process studies do not require the specificity or analysis required by NEPA. In all likelihood, the studies produced as part of the transportation planning process will only be foundational to subsequent NEPA studies and will need to be supplemented with additional analysis and detail before fully meeting the rigorous requirements of NEPA.

Appendix B--Fiscal Constraint of Transportation Plans and Programs

The purpose of an Appendix to a regulation is to improve the quality or use of a rule, without imposing new requirements or restrictions. As was stated, appendices provide supplemental, background or explanatory information that illustrates or amplifies a rule. The FHWA and the FTA received a significant number of comments on Appendix B. State DOTs, MPOs and COGs, national and regional advocacy organizations, transit agencies and others expressed concern about imposing new requirements in the Appendix.

The docket included about 80 documents that contained about 170 comments on Appendix B. Most of the comments came from State DOTs and from MPOs and COGs in about equal numbers. Many national and regional advocacy organizations also provided comments on this section. A few public transportation providers and local government agencies provided the remainder of the comments.

Many of the State DOTs, almost all of the MPOs and COGs, many of the national and regional advocacy organizations, and a few of the public transportation providers that commented on this section objected to the Appendix being included in regulation, were generally supportive of the guidance information but many had comments on individual elements of the text as described below. Many of the State DOTs and a few of the national and regional advocacy organizations objected strongly to the text on fiscal constraint being included in regulation or as guidance though some would accept guidance with significant revisions.

When proposing Appendix B to the rule, the FHWA and the FTA intended to raise the level of awareness and importance in developing fiscally constrained transportation plans, TIPs, and STIPs to States, MPOs, and public transportation operators. Since its introduction under the ISTEA, fiscal constraint has remained a prominent aspect of transportation plan and program development, carrying through to the TEA-21 and now to the SAFETEA-LU. The FHWA and the FTA acknowledge that Appendix B contains a combination of guidance, amplifying information, and additional criteria. Given the level of controversy regarding this Appendix, it has been removed from the rule.

Instead, the FHWA and the FTA will be developing and issuing revised guidance on fiscal constraint and financial planning for transportation plans and programs soon after this rule is published.

The FHWA and the FTA find that three key features of Appendix B merit inclusion in the rule, as noted in the section-by-section discussions for § 450.216 (Development and content of the statewide transportation [*7253] improvement program (STIP), § 450.322 (Development and content of the metropolitan transportation plan), and § 450.324 (Development and content of the transportation improvement program). These key features are: (1) Treatment of high-

way and transit operations and maintenance costs and revenues; (2) use of "year of expenditure dollars" in developing cost and revenue estimates; and (3) use of "cost ranges/cost bands" in the outer years of the metropolitan transportation plan.

Regarding the treatment of highway and transit operations and maintenance costs and revenues, the FHWA and the FTA realize that the 1993 planning rule and the NPRM interchangeably referred to the transportation system as either "existing," "total," or "entire."

Several State DOTs, MPOs and COGs, national and regional advocacy organizations, and others expressed concern and confusion over these terms. Many commenters called into question the statutory authority for the FHWA and the FTA to focus on State and local government investments to operate and maintain the "system" as part of fiscal constraint and financial plans supporting transportation plans and programs. However, the statute, as amended by the SAFETEA-LU (*23 U.S.C. 134(i)(2)(C)* and *49 U.S.C. 5303(i)(2)(C)*), requires that the financial element of a metropolitan transportation plan "demonstrates how the adopted transportation plan can be implemented" and "indicates resources from public and private sources" that can be "reasonably anticipated to implement the plan." A metropolitan transportation plan, as it is developed, must include consideration and recognition of how all the pieces of the regional transportation system will integrate, function and operate, not just those facilities which are or could be funded with Federal resources. To focus solely on the Federally-funded portion of the transportation system could create greater demands on limited Federal resources or jeopardize the value of the Federal investments made within that metropolitan area. Furthermore, outside the transportation planning process, there is a longstanding Federal requirement that States properly maintain, or cause to be maintained, any projects constructed under the Federal-aid Highway Program (*23 U.S.C. 116*).

Additionally, the FHWA and the FTA believe that the fundamental premise behind the wording in the October 28, 1993 planning rule regarding highway and transit operations and maintenance *(58 FR 58040)* remains sound.

However, for purposes of clarity and consistency, § 450.216(n), § 450.322(f)(10), and § 450.324(i) have been revised to better describe "the system" as Federal-aid highways (as defined by *23 U.S.C. 101(a)(5)*) and public transportation (as defined by title 49 U.S.C. Chapter 53). As background, *23 U.S.C. 101(a)(5)* defines "Federal-aid highways" as "a highway eligible for assistance other than a highway classified as a local road or rural minor collector." Additionally, these sections clarify that the financial plans supporting the metropolitan transportation plan and TIP and the financial information supporting the STIP are to be based on systems-level estimates of costs and revenue sources reasonably expected to be available to adequately operate and maintain Federal-aid highways (as defined by *23 U.S.C. 101(a)(5)*) and public transportation (as defined by title 49 U.S.C. Chapter 53).

Regarding the use of "year of expenditure dollars" in developing cost and revenue estimates, the FHWA and the FTA jointly issued "Interim FHWA/FTA Guidance on Fiscal Constraint for STIPs, TIPs, and Metropolitan Plans" on June 30, 2005. n22 This Interim Guidance indicated that financial forecasts (for costs and revenues) to support the metropolitan transportation plan, TIP, and STIP may: (a) Rely on a "constant dollar" base year or (b) utilize an inflation rate(s) to reflect "year expenditure." The FHWA and the FTA will be developing and issuing revised guidance on fiscal constraint and financial planning for transportation plans and programs soon after this rule is published. In Appendix B, the FHWA and the FTA proposed to exclusively require the use of "year of expenditure dollars" to better reflect the time-based value of money. This is particularly crucial for large-scale projects with construction/implementation dates stretching into the future. Because the transportation planning process serves as the beginning point of the larger "project continuum" (i.e., moving from concept through construction, and later operations and maintenance), the FHWA and the FTA strongly believe that early disclosure of revenue and cost estimates reflecting time and inflation provides a truer set of expectations and future "reality" to the public. However, most of the State DOTs, a few of the national and regional advocacy organizations and some MPOs and COGs, commented that they should not be required to use "year of expenditure dollars."

n22 This joint guidance, "Interim FHWA/FTA Guidance on Fiscal Constraint for STIPs, TIPs and Metropolitan Plans," dated June 27, 2005, is available via the Internet at the following URL: *http://www.fhwa.dot.gov/planning/fcindex.htm*.

The FHWA and the FTA considered these comments and included in § 450.216(h), § 450.322(f)(10), and § 450.324(d) that "year of expenditure dollars" shall be used "to the extent practicable." While this language expresses the desire of the FHWA and the FTA for revenue and cost estimates to be reflected in "year of expenditure dollars," an opportunity to use "constant dollars" has been retained.

Regarding the use of "cost ranges/cost bands" in the outer years of the metropolitan transportation plan, the FHWA and the FTA jointly issued "Interim Guidance on Fiscal Constraint for STIPs, TIPs, and Metropolitan Plans" on June 30, 2005. The FHWA and the FTA will be developing and issuing revised guidance on fiscal constraint and financial planning for transportation plans and programs soon after this rule is published. The Interim Guidance indicated that for the outer years of the metropolitan transportation plan (i.e., beyond the first 10 years), the financial plan may reflect aggregate cost ranges/cost bands, as long as the future funding source(s) is reasonably expected to be available to support the projected cost ranges/cost bands. In the NPRM, the FHWA and the FTA proposed to provide this option to MPOs in developing fiscally-constrained metropolitan transportation plans. We have included this option in this rule because we believe it gives MPOs maximum flexibility to broadly define a large-scale transportation issue or problem to be addressed in the future that does not predispose a NEPA decision, while, at the same time, calling for the definition of a future funding source(s) that encompasses the planning-level "cost range/cost band."

23 CFR Part 500

Section 500.109 Congestion Management Systems

Few docket documents specifically referenced this section. However, the docket included more than 25 documents that contained almost 30 comments on § 450.320 (Congestion management process in transportation management areas) which is relevant to this section.

As was mentioned, on May 16, 2006, the U.S. Secretary of Transportation announced a national initiative to address congestion related to highway, freight and aviation. The intent of the "National Strategy to Reduce Congestion on America's Transportation [*7254] Network" is to provide a blueprint for Federal, State and local officials to tackle congestion. The States and MPO(s) are encouraged to seek Urban Partnership Agreements with a handful of communities willing to demonstrate new congestion relief strategies and encourages States to pass legislation giving the private sector a broader opportunity to invest in transportation. It calls for more widespread deployment of new operational technologies and practices that end traffic tie ups, designates new interstate "corridors of the future," targets port and border congestion, and expands aviation capacity.

U.S. DOT encourages the State DOTs and MPOs to consider and implement strategies, specifically related to highway and transit operations and expansion, freight, transportation pricing, other vehicle-based charges techniques, etc. The mechanism that the State DOTs and MPOs employ to explore these strategies is within their discretion. The U.S. DOT will focus its resources, funding, staff and technology to cut traffic jams and relieve freight bottlenecks.

A few comments were received reiterating that the CMP should result in multimodal system performance measures and strategies. The FHWA and the FTA note that existing language reflects the multimodal nature of the CMP. Specifically, § 450.320(a)(2) allows for the appropriate performance measures for the CMP to be determined cooperatively by the State(s), affected MPO(s), and local officials in consultation with the operators of major modes of transportation in the coverage area.

Several commenters asked for a clarification with regards to what CMP requirements apply in air quality attainment areas, as opposed to the requirements in air quality nonattainment areas. The CMP requirements for all TMA areas (attainment and nonattainment) are identified in §§ 450.320(a), 450.320(b), 450.320(c), and 450.320(f). Additional CMP requirements that apply only to nonattainment TMA areas (for CO and ozone) are identified in § 450.320(d) and § 450.320(e).

49 CFR Part 613

The NPRM proposed to simplify FTA's cross-reference in 49 CFR Part 613 to 23 CFR Part 450. Because there may be references to the three subparts in 49 CFR Part 613 in various other regulatory and guidance documents, FTA has made technical changes to what was proposed in the NPRM to retain the names of the subparts in this part the same as they were prior to this rule. This will reduce confusion by keeping the names of the subparts the same, but still allowing for the cross-reference simplification and alignment of identical regulatory requirements that FTA had proposed.

Distribution Tables

The NPRM proposed to clarify and revise the regulation's section headings to use plainer language. These changes have been made. For ease of reference, two distribution tables are provided for the current sections and the proposed

sections as follows. The first distribution table indicates changes in section numbering and titles. The second provides details within each section.

Section Title and Number

Old section	New section
Subpart A	Subpart A
450.100 Purpose	450.100 Purpose.
450.102 Applicability	450.102 Applicability.
450.104 Definitions	450.104 Definitions.
Subpart B	Subpart B
450.200 Purpose	450.200 Purpose.
450.202 Applicability	450.202 Applicability.
450.204 Definitions	450.204 Definitions.
450.206 Statewide transportation planning process: General requirements	450.206 Scope of the statewide transportation planning process.
450.208 Statewide transportation planning process: Factors	450.208 Coordination of planning process activities.
450.210 Coordination	450.210 Interested parties, public involvement, and consultation.
	450.212 Transportation planning studies and project development.
450.212 Public involvement	450.214 Development and content of the long-range statewide transportation plan.
450.214 Statewide transportation plan	450.216 Development and content of the statewide transportation improvement program (STIP).
450.216 Statewide transportation	450.218 Self-certifications, Federal improvement program (STIP). findings, and Federal approvals.
450.218 Funding	450.220 Project selection from the STIP.
450.220 Approvals	450.222 Applicability of NEPA to statewide transportation plans and programs.
450.222 Project selection for implementation	450.224 Phase-in of new requirements.
Subpart C	Subpart C
450.300 Purpose	450.300 Purpose.
450.302 Applicability	450.302 Applicability.
450.304 Definitions	450.304 Definitions.
450.306 Metropolitan planning organizations: Designation and redesignation	450.306 Scope of the metropolitan transportation planning process.
450.308 Metropolitan planning organization: Metropolitan planning boundary	450.308 Funding for transportation planning and unified planning work programs.
450.310 Metropolitan planning organization: planning agreements	450.310 Metropolitan planning organization designation and redesignation.
450.312 Metropolitan	450.312 Metropolitan planning

Section Title and Number

Old section	New section
transportation planning: Responsibilities, cooperation, and coordination	area boundaries.
450.314 Metropolitan transportation planning process: Unified planning work programs	450.314 Metropolitan planning agreements.
450.316 Metropolitan transportation planning process: Elements	450.316 Interested parties, participation and consultation.
450.318 Metropolitan transportation planning process: Major metropolitan transportation investments	450.318 Transportation planning studies and project development.
450.320 Metropolitan transportation planning process: Relation to management systems	450.320 Congestion management process in transportation management areas.
450.322 Metropolitan transportation planning process: Transportation plan	450.322 Development and content of the metropolitan transportation plan.
450.324 Transportation improvement program: General	450.324 Development and content of the transportation improvement program (TIP).
450.326 Transportation improvement program: modification	450.326 TIP revisions and relationship to the STIP.
450.328 Transportation improvement program: Relationship to statewide TIP	450.328 TIP action by the FHWA and the FTA.
450.330 Transportation improvement program: Action required by FHWA/FTA	450.330 Project selection from the TIP.
450.332 Project selection for implementation	450.332 Annual listing of obligated projects.
450.334 Metropolitan transportation planning process: Certification	450.334 Self-certifications and Federal certifications.
450.336 Phase-in of new requirements	450.336 Applicability of NEPA to metropolitan transportation plans and programs.
None	450.338 Phase-in of new requirements.
	Section 500
500.109 CMS	500.109 CMS.

The following distribution table identifies details for each existing section and proposed section:

Old section	New section
Subpart A	Subpart A
450.100	450.100 [Revised].
450.102	450.102.
450.104 Definitions	450.104. Definitions.

Old section	New section
None	Administrative modification [New].
None	Alternatives analysis [New].
None	Amendment [New].
None	Attainment area [New].
None	Available funds [New].
None	Committed funds [New].
None	Conformity [New].
None	Conformity lapse [New].
None	Congestion management process [New].
None	Consideration [New].
Consultation	Consultation [Revised].
Cooperation	Cooperation [Revised].
None	Coordinated public transit-human services transportation plan [New].
Coordination	Coordination [Revised].
None	Design concept [New].
None	Design scope [New].
None	Designated recipient [New].
None	Environmental mitigation activities [New].
None	Federal land management agency [New].
None	Federally funded non-emergency transportation services [New].
None	Financially constrained or Fiscal constraint [New].
None	Financial plan [New].
None	Freight shippers [New].
None	Full funding grant agreement [New].
Governor	Governor.
None	Illustrative project [New].
None	Indian Tribal government [New].
None	Intelligent transportation system (ITS) [New].
None	Interim metropolitan transportation plan [New].
None	Interim transportation improvement program (TIP) [New].
Maintenance area	Maintenance area [Revised].
Major metropolitan transportation investment	Removed.
Management system	Management system [Revised].
Metropolitan planning area	Metropolitan planning area (MPA) [Revised].
Metropolitan planning organization (MPO)	Metropolitan planning organization. (MPO) [Revised].
Metropolitan transportation plan	Metropolitan transportation plan.
None	National ambient air quality

Old section	New section
	standards (NAAQS) [New].
Nonattainment area	Nonattainment area.
Non-metropolitan area	Non-metropolitan area.
Non-metropolitan local official	Non-metropolitan local official.
None	Obligated projects [New].
None	Operational and management strategies [New].
None	Project construction grant agreement [New].
None	Project selection [New].
None	Provider of freight transportation services [New].
None	Public transportation operator [New].
None	Regional ITS architecture [New].
Regionally significant project	Regionally significant project [Revised].
None	Revision [New].
State	State.
State implementation plan (SIP)	State implementation plan (SIP) [Revised].
Statewide transportation improvement program (STIP)	Statewide transportation improvement program (STIP) [Revised].
Statewide transportation plan	Long-range statewide transportation plan [Revised].
None	Strategic highway safety plan [New].
None	Transportation control measures (TCMs) [New].
Transportation improvement program (TIP)	Transportation improvement program (TIP) [Revised].
Transportation management area (TMA)	Transportation management area (TMA) [Revised].
None	Unified planning work program (UPWP) [New].
None	Update [New].
None	Urbanized area [New].
None	Users of public transportation [New].
None	Visualization techniques [New].
Subpart B	Subpart B
450.200	450.200 [Revised].
450.202	450.202 [Revised].
450.204	450.204 [Revised].
450.206(a)(1) through (a)(5)	Removed.
450.206(b)	450.208(a)(1) [Revised].
450.206(c)	450.208(a)(4).
450.208(a)(1)	450.208(d) [Revised].
450.208(a)(2) through (a)(23)	450.206(a)(1) through (a)(8) [Revised].
450.208(b)	450.206(b) [Revised].
None	450.206(c) [New].

Old section	New section
450.210(a)(1) through (a)(13)	450.208(a)(1) through (a)(7) [Revised].
450.210(b)	Removed.
None	450.208(b) [New].
None	450.208(c) [New].
None	450.208(e) [New].
None	450.208(f) [New].
None	450.208(g) [New].
None	450.208(h) [New].
450.212(a) through (g)	450.210(a) [Revised].
450.212(h) through (i)	450.210(b)(1) through (b)(2) [Revised].
None	450.210(c) [New].
None	450.212(a) through (c) [New].
450.214(a) through (b)(3)	450.214(a) [Revised].
None	450.214(b) [New].
450.214(b)(4)	450.214(f) [Revised].
450.214(b)(5)	450.214(c) [Revised].
450.214(b)(6)	450.214(l) [Revised].
None	450.214(d) [New].
None	450.214(e) [New].
450.214(c)(1) through (c)(5)	450.214(g) and (h) [Revised].
450.214(d)	Removed.
None	450.214(i) [New].
None	450.214(j) [New].
None	450.214(m) [New].
None	450.214(n) [New].
450.214(e)	450.214(o).
None	450.214(p) [New].
450.214(f)	450.214(g) [Revised].
450.216(a) last sentence	450.216(f) [Revised].
450.216(a)(1) through (a)(2)	450.216(a) through (b) [Revised].
450.216(a)(3)	450.216(k).
None	450.216(l) [New].
450.216(a)(4)	450.216(b) [Revised].
None	450.216(d) [New].
None	450.216(e) [New].
450.216(a)(5)	450.216(m) [Revised].
450.216(a)(6)	450.216(g) [Revised].
450.216(a)(7)	450.216(h) [Revised].
450.216(a)(8)	450.216(i) [Revised].
450.216(a)(9)	Removed.
450.216(b)	450.216(j) [Revised.]
450.216(b) last sentence	450.216(f).
450.216(c) through (d)	450.216(n) [Revised].
None	450.216(o) [New].
450.216(e)	450.216(c) [Revised].
450.218	450.206(d) [Revised].
450.220(a) through (g)	450.218(a) through (d) [Revised].
450.222(a) through (d)	450.220(a) through (e) [Revised].
None	450.222 [New].

Old section	New section
450.224(a) through (b)	450.224(a) through (c) [Revised].
Subpart C	Subpart C
450.300	450.300 [Revised].
450.302	450.302 [Revised].
450.304	450.304 [Revised].
450.306(a) through (d)	450.310(a) through (h) [Revised].
450.306(e)	450.310(f) [Revised].
None	450.310(g) [New].
450.306(f)	Removed.
450.306(g)	450.310(i) [Revised].
450.306(h)	450.310(j) [Revised].
450.306(i) through (j)	Removed.
450.306(k)	450.310(k) through (l) [Revised].
None	450.310(k) [New].
450.308(a) through (c)	450.312(a), (b), and (i) [Revised].
None	450.312(c) [New].
None	450.312(d) [New].
None	450.312(e) [New].
None	450.312(f) [New].
None	450.312(g) [New].
None	450.312(h) [New].
450.308(d)	450.312(j) [Revised].
450.310(a), (b), and (d)	450.314(a) [Revised].
450.310(c)	450.314(c).
450.310(e)	Removed.
450.310(f)	450.314(b) [Revised].
450.310(g)	450.314(d) [Revised].
450.310(h)	Removed.
None	450.314(f) [New].
450.312(a)	450.314(a) [Revised].
450.312(b)	450.322(c) [Revised].
450.312(c)	450.322(d) [Revised].
450.312(d)	Removed.
450.312(e)	450.314(b), (d), and (e) [Revised].
450.312(f)	450.306(i).
450.312(g)	Removed.
450.312(h)	Removed.
450.312(i)	450.316(c) through (d) [Revised].
None	450.316(e) [New].
None	450.308(a) [New].
450.314(a) through (d)	450.308(b) through (e) [Revised].
None	450.308(f) [New].
450.316(a)(1) through (a)(16)	450.306(a)(1) through (a)(8) [Revised].
None	450.306(b) [New].
None	450.306(c) [New].
None	450.306(d) [New].

Old section	New section
None	450.306(e) [New].
None	450.306(f) [New].
None	450.306(g) [New].
None	450.306(h) [New].
None	450.316(a) [New].
450.316(b)(1)(i)	450.316(a)(3) [Revised].
450.316(b)(1)(ii) through (b)(1)(vi)	450.316(a)(1)(i) through (a)(1)(vi) [Revised].
450.316(b)(1)(vii)	450.316(a)(2) [Revised].
450.316(b)(1)(viii) through (b)(1)(xi)	450.316(a)(1)(vii) through (a)(1)(x) [Revised].
450.316(b)(2)	Removed.
450.316(b)(3)	Removed.
450.316(b)(4)	Removed.
None	450.316(b) [New].
450.312(i)	450.316(c).
None	450.316(d) [New].
450.316(c)	450.306(j) [Revised].
450.316(d)	Removed.
450.318(a) through (f)	450.318(a) through (e) [Revised].
450.320(a)	450.320(a) [Revised].
450.320(b)	450.320(d) and (e) [Revised].
450.320(c)	450.320(b) [Revised].
450.320(d)	450.320(b) [Revised].
500.109(a) second, fourth, and fifth sentences	450.320(b) [Revised].
500.109(b)	450.320(c) [Revised].
500.109(b)(1) through (b)(6)	450.320(c)(1) through (c)(6) [Revised].
None	450.320(f) [New].
450.322(a) and (e)	450.322(a) through (c) [Revised].
None	450.322(e) [New].
450.322(b)(1) through (b)(2)	450.322(f)(1) through (f)(2) [Revised].
450.322(b)(3)	450.322(f)(8) [Revised].
450.322(b)(4) through (b)(7)	450.322(f)(3) through (f)(6) [Revised].
450.322(b)(8)	Removed.
450.322(b)(9)	450.322(f)(7) and (g)(1) through (g)(2) [Revised].
450.322(b)(10)	450.324(f)(9) [Revised].
450.322(b)(11)	450.322(f)(10) [Revised].
None	450.322(h) [New].
450.322(c)	450.322(i) [Revised].
None	450.322(j) [New].
None	450.322(k) [New].
450.322(d)	450.322(l) [Revised].
450.324(a) through (i)	450.324(a) through (i) [Revised].
450.324(j) through (k)	Removed.
450.324(l) through (m)	450.324(j) through (k) [Revised].

Old section	New section
450.324(n)	450.324(l).
None	450.324(m) [New].
None	450.324(n) [New].
None	450.324(o) [New].
450.326	450.326(a) [Revised].
450.328(a) through (b)	450.326(b) through (c) [Revised].
450.330(a) through (b)	450.328(a) through (b) [Revised].
None	450.328(c) through (e) [New].
450.324(o)	450.328(f) [Revised].
450.332(a) through (e)	450.330(a) through (e) [Revised].
None	450.332(a) through (c) [New].
450.334(a) through (h)	450.334(a) through (b) [Revised].
None	450.336 [New].
450.336	450.338(a) through (e) [Revised].
500.109 first and third sentences	500.109(a) [Revised].
500.109(a) second, fourth, and fifth sentences	500.109(b) [Revised].

Rulemaking Analyses and Notices

The FHWA and the FTA received and considered more than 1,600 comments by the comment closing date of September 7, 2006. In addition, we considered all comments received after the closing date to the extent practicable.

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

The FHWA and the FTA have determined that this rulemaking is a significant regulatory action within the meaning of Executive Order 12866, and is significant under Department of Transportation regulatory policies and procedures because of substantial State, local government, congressional, and public interest. These interests involve receipt of Federal financial support for transportation investments, appropriate compliance with statutory requirements, and balancing of transportation mobility and environmental goals. This rule will add new coordination and documentation requirements (e.g., greater public outreach and consultation with State and local planning and resource agencies, annual listing of obligated projects, etc.), but will reduce the frequency of some existing regulatory reporting requirements (e.g., metropolitan transportation plan, STIP/TIP, and certification reviews). The FHWA and the FTA have sought to maintain previous flexibility of operation wherever possible for State DOTs, MPOs, and other affected organizations, and to utilize existing processes to accomplish any new tasks or activities. We did not receive any comments on this analysis.

The FHWA and the FTA conducted a cost analysis identifying each of the proposed regulatory changes that would have a significant cost impact for MPOs or State DOTs, and have estimated those costs on an annual basis. This cost analysis was posted on the docket as a separate document, entitled "Regulatory Cost Analysis of Proposed Rulemaking." We did not receive any comments on the cost analysis. We have not made changes that substantively affect the cost or benefits calculations used in the analysis. Therefore, no changes are made to the cost analysis and we believe that the economic impact of this rulemaking will be minimal.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96-354; *5 U.S.C. 601*-612), the FHWA and the FTA have determined that States and MPOs are not included in the definition of small entity set forth in *5 U.S.C. 601*. Small

governmental jurisdictions are limited to representations of populations of less than 50,000. MPOs, by definition, represent urbanized areas having a minimum population of 50,000. Therefore the Regulatory Flexibility Act [*7259] does not apply. We did not receive any comments on the Regulatory Flexibility Act determination.

Unfunded Mandates Reform Act of 1995

This rule will not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, March 22, 1995, 109 Stat. 48). This rule will not result in the expenditure of non-Federal funds by State, local, and Indian Tribal governments, in the aggregate, or by the private sector, of $ 128.1 million in any one year (*2 U.S.C. 1532*).

Additionally, the definition of "Federal mandate" in the Unfunded Mandates Reform Act excludes financial assistance of the type in which State, local, or Indian Tribal governments have authority to adjust their participation in the program in accordance with changes made in the program by the Federal government. The Federal-aid highway program and Federal Transit Act permit this type of flexibility to the States. We did not receive any comments on the Unfunded Mandates Reform Act.

Executive Order 13132 (Federalism)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, and the FHWA and the FTA have determined that this action will not have sufficient federalism implications to warrant the preparation of a Federalism assessment. The FHWA and the FTA have also determined that this action will not preempt any State law or regulation or affect the States' ability to discharge traditional State governmental functions.

By letter dated November 29, 2005, the FHWA and the FTA solicited comments from the National Governors' Association (NGA) as representatives for the elected State officials on the Federalism implications of this proposed rule. n23 An identical letter was sent on the same date to several other organizations representing elected officials and Indian Tribal governments. These organizations were: The National Conference of State Legislators (NCSL), the American Public Works Association (APWA), the Association of Metropolitan Planning Organizations (AMPO), the National Association of Regional Councils (NARC), the National Association of Counties (NACO), the Conference of Mayors (COM), the National Association of City Transportation Officials (NACTO), and the National Congress of American Indians (NCAI).

n23 A copy of this letter is included in the docket.

In response to this letter, AMPO and NARC requested a meeting to discuss their Federalism concerns. On December 21, 2005, we met with representatives from AMPO and NARC. A summary of this meeting is available in the docket. Briefly, both AMPO and NARC expressed concern with the potential burdens that new requirements might have on MPOs, especially the smaller MPOs. In particular, AMPO and NARC were concerned with our implementation of the SAFETEA-LU provisions relating to public participation, congestion management process, and implementation of planning update cycles. We did consider these concerns when drafting the final rule. We did not receive additional comments on Federalism issues.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Numbers 20.205, Highway Planning and Construction (or 20.217); 20.500, Federal Transit Capital Improvement Grants; 20.505, Federal Transit Technical Studies Grants; 20.507, Federal Transit Capital and Operating Assistance Formula Grants. The regulations implementing Executive Order 12372 regarding intergovernmental consultation in Federal programs and activities apply to these programs. The FHWA and the FTA did not receive any comments on these programs.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (*44 U.S.C. 3501 et. seq.*), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct, sponsor, or require through regulations. The FHWA and the FTA have determined that this regulation contains collection of information requirements for the purposes of the Paperwork Reduction Act. However, the FHWA and the FTA believe that any increases in burden hours per submission are more than offset by decreases in the frequency of collection for these information requirements.

The reporting requirements for metropolitan planning unified planning work programs (UPWPs), transportation plans, and transportation improvement programs (TIPs) are approved under OMB control number 2132-0529. Under the previous planning regulations, the burden hours were estimated to be 314,900; however, due to the reduction in the frequency of collection, the burden hours for this final rule are estimated to be only 250,295 hours. That is a reduction of 64,605 burden hours. This collection has been approved by OMB with an expiration date of August 31, 2009. The information reporting requirements for State planning work programs were approved by the OMB under control number 2125-0039 (expiration date: November 30, 2007). However, we have combined these collections into one OMB control number (2132-0529). The FTA conducted the analysis supporting this approval on behalf of both the FTA and the FHWA, since the regulations are jointly issued by both agencies. The reporting requirements for statewide transportation plans and programs are also approved under this same OMB control number. The information collection requirements addressed under the current OMB approval number (2132-0529) impose a total burden of 250,295 hours on the planning agencies that must comply with the requirements in the new regulation. The FHWA and the FTA conducted an analysis of the change in burden hours attributed to the rulemaking, based on estimates used in the submission for OMB approval. This analysis is included on the docket as a separate document entitled "Estimated Change in Reporting Burden Hours Attributable to the final rule."

The docket contained a comment on the estimated change in reporting burden hours. The commenter stated that the analysis was unrealistically low because it failed to account for the costs of implementing the proposed fiscal constraint and STIP amendment provisions. The FHWA and the FTA disagree with this comment. The fiscal constraint requirements are not new with this rulemaking; they were introduced under the ISTEA, and subsequently reaffirmed under the SAFETEA-LU (*23 U.S.C. 134 (i)(2)(C), 23 U.S.C. 134 (j)(1)(C), 49 U.S.C. 5301 (a)(1),* and *49 U.S.C. 5303 (j)(2)(C)*). Appendix B (Fiscal Constraint of Transportation Plans and Programs) has been removed from the rule, although three key features were included in appropriate sections. Please see the responses to the comments on Appendix B for additional background information and explanation.

Consequently, the FHWA and the FTA find that the fiscal constraint provision does not add new burden on State DOTs and MPOs, and therefore is not subject to a cost analysis. Furthermore the FHWA and the FTA believe that the changes in definitions regarding TIP/STIP amendments [*7260] actually reduce the administrative burden by introducing the concept of an "administrative modification," which allows minor changes to be made without requiring public review and comment, redemonstration of fiscal constraint, or a conformity determination. Finally, the cost analysis does specifically recognize that some additional costs may be incurred to address new coordination provisions, and estimates an average cost increase for State DOTs of approximately $ 54,000 per year. Some States may incur higher costs, while others may incur lower costs. However, these additional costs for transportation plan development are partially offset by estimated cost savings due to other provisions (e.g., reduction in the required frequency of STIP updates). No substantial change was made to the "Estimated Change in Reporting Burden Hours Attributable to the final rule" as a result of these comments. Additionally, there has been no change since the approval of the most recent information collection request (ICR) and no change between the NPRM and final rule.

The analysis results are summarized below.

The creation and submission of required reports and documents have been limited to those specifically required by *23 U.S.C. 134* and *135* and in *49 U.S.C. 5303* and *5304* or essential to the performance of our findings, certifications and/or approvals. The final rule will have no significant change in the submission requirements for UPWPs or State planning work programs; therefore there is no change in the annual reporting burden for this element. The final rule will require that additional sections be added to the metropolitan and statewide transportation plans, which we estimate would increase the required level of effort by 20 percent over current plan development. However, the final rule also reduces the required frequency of plan submission from 3 to 4 years for MPOs located in nonattainment or maintenance areas. One half of all MPOs are located in nonattainment or maintenance areas and would realize a reduction in their annual reporting burden. Based on the burden hours used in the FTA analysis submitted for OMB approval, the decrease in burden hours for MPOs located in nonattainment and maintenance areas more than offsets the increase in burden hours associated with the new sections required in the plans.

The final rule requires that State and metropolitan transportation improvement program (STIP and TIP) documents include 4 years of projects; an increase from 3 years of projects required under the previous regulations. The inclusion of an additional year of projects will increase the reporting burden associated with TIP development by 10 percent over current levels. However, the final rule also reduces the required frequency of TIP submission from 2 years to 4 years for all States and MPOs. Based on the burden hours used in the FTA analysis submitted for OMB approval, the decrease in burden hours associated with the reduced frequency of submission more than offsets the increase in burden hours asso-

ciated with including an additional year of projects in the TIP. The FHWA and the FTA have not made changes to the rule that would substantively affect this analysis. None of the changes made to the regulatory language between the NPRM and the final rule alter information collection requirements.

National Environmental Policy Act

The FHWA and the FTA have analyzed this action for the purpose of the National Environmental Policy Act of 1969 (*42 U.S.C. 4321*), and have determined that this action would not have any effect on the quality of the environment. A small number of national and regional advocacy organizations wrote that this rulemaking process should be subject to NEPA because certain regulatory provisions (e.g., Appendix A (Linking the transportation planning and NEPA processes), § 450.212 (Transportation planning studies and project development), and § 450.318 (Transportation planning studies and project development)) will impact how environmental considerations are addressed by State DOTs and MPOs. The FHWA and the FTA disagree. The proposed rule defines a process for carrying out the transportation planning provisions as specified in the SAFETEA-LU. It does not rescind or alter any of the requirements specified under NEPA with respect to overall long range transportation planning or project evaluation. Individual plans and projects submitted by State DOTs and MPOs would continue to be subject to NEPA requirements.

Furthermore, the SAFETEA-LU clearly states in *23 U.S.C. 135(j)* and *49 U.S.C. 5304(j)* that "any decision by the Secretary concerning a metropolitan or statewide transportation plan or the transportation improvement program shall not be considered to be a Federal action subject to review under [NEPA]."

Executive Order 12988 (Civil Justice Reform)

This action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The FHWA and the FTA did not receive any comment on this determination.

Executive Order 13045 (Protection of Children)

We have analyzed this action under Executive Order 13045, protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not concern an environmental risk to health or safety that may disproportionately affect children. The FHWA and the FTA did not receive any comment on this determination.

Executive Order 12630 (Taking of Private Property)

This rule will not effect a taking of private property or otherwise have taking implications under Executive order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights. The FHWA and the FTA did not receive any comment on this determination.

Executive Order 13175 (Tribal Consultation)

The FHWA and the FTA have analyzed this action under Executive Order 13175, dated November 6, 2000, and believe that the action will not have substantial direct effects on one or more Indian tribes; will not impose substantial direct compliance costs on Indian Tribal governments; and will not preempt Tribal laws. The planning regulations contain requirements for States to consult with Indian Tribal governments in the planning process. Tribes are required under 25 CFR part 170 to develop long range plans and develop an Indian Reservation Roads (IRR) TIP for programming IRR projects. However, the requirements in 25 CFR part 170 and would not be changed by this rulemaking. Therefore, a Tribal summary impact statement is not required. The FHWA and the FTA did not receive any comment on this analysis or determination.

Executive Order 13211 (Energy Effects)

We have analyzed this action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use dated May 18, 2001. We have determined that it is not a significant energy action under that [*7261] order because although it is a significant regulatory action under Executive Order 12866, it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required. The FHWA and the FTA did not receive any comment on this determination.

Regulation Identification Number

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

List of Subjects

23 CFR Parts 450 and 500

Grant Programs--transportation, Highway and roads, Mass transportation, Reporting and record keeping requirements.

49 CFR Part 613

Grant Programs--transportation, Highway and roads, Mass transportation, Reporting and record keeping requirements.

Issued on: January 29, 2007.

J. Richard Capka,

Federal Highway Administrator.

Issued on: January 31, 2007.

James S. Simpson,

Federal Transit Administrator.

For the reasons discussed in the preamble, the FHWA and the FTA amend title 23, parts 450 and 500, and title 49, part 613, Code of Federal Regulations as follows:

Title 23--Highways

1. Revise Part 450 to read as follows:

PART 450--PLANNING ASSISTANCE AND STANDARDS

Subpart A--Transportation Planning and Programming Definitions

Sec.

450.100 Purpose.

450.102 Applicability.

450.104 Definitions.

Subpart B--Statewide Transportation Planning and Programming

450.200 Purpose.

450.202 Applicability.

450.204 Definitions.

450.206 Scope of the statewide transportation planning process.

450.208 Coordination of planning process activities.

450.210 Interested parties, public involvement, and consultation.

450.212 Transportation planning studies and project development.

450.214 Development and content of the long-range statewide transportation plan.

450.216 Development and content of the statewide transportation improvement program (STIP).

450.218 Self-certifications, Federal findings, and Federal approvals.

450.220 Project selection from the STIP.

450.222 Applicability of NEPA to statewide transportation plans and programs.

450.224 Phase-in of new requirements.

Subpart C--Metropolitan Transportation Planning and Programming

Sec.

450.300 Purpose.

450.302 Applicability.

450.304 Definitions.

450.306 Scope of the metropolitan transportation planning process.

450.308 Funding for transportation planning and unified planning work programs.

450.310 Metropolitan planning organization designation and redesignation.

450.312 Metropolitan planning area boundaries.

450.314 Metropolitan planning agreements.

450.316 Interested parties, participation, and consultation.

450.318 Transportation planning studies and project development.

450.320 Congestion management process in transportation management areas.

450.322 Development and content of the metropolitan transportation plan.

450.324 Development and content of the transportation improvement program (TIP).

450.326 TIP revisions and relationship to the STIP.

450.328 TIP action by the FHWA and the FTA.

450.330 Project selection from the TIP.

450.332 Annual listing of obligated projects.

450.334 Self-certifications and Federal certifications.

450.336 Applicability of NEPA to metropolitan transportation plans and programs.

450.338 Phase-in of new requirements.

Appendix A to part 450--Linking the transportation planning and NEPA processes.

Authority: *23 U.S.C. 134* and *135*; *42 U.S.C. 7410 et seq.*; *49 U.S.C. 5303* and *5304*; *49 CFR 1.48* and *1.51*.

Subpart A--Transportation Planning and Programming Definitions

§ 450.100 Purpose.

The purpose of this subpart is to provide definitions for terms used in this part.

§ 450.102 Applicability.

The definitions in this subpart are applicable to this part, except as otherwise provided.

§ 450.104 Definitions.

Unless otherwise specified, the definitions in *23 U.S.C. 101(a)* and *49 U.S.C. 5302* are applicable to this part.

Administrative modification means a minor revision to a long-range statewide or metropolitan transportation plan, Transportation Improvement Program (TIP), or Statewide Transportation Improvement Program (STIP) that includes minor changes to project/project phase costs, minor changes to funding sources of previously-included projects, and minor changes to project/project phase initiation dates. An administrative modification is a revision that does not require public review and comment, redemonstration of fiscal constraint, or a conformity determination (in nonattainment and maintenance areas).

Alternatives analysis (AA) means a study required for eligibility of funding under the Federal Transit Administration's (FTA's) Capital Investment Grant program (*49 U.S.C. 5309*), which includes an assessment of a range of alternatives designed to address a transportation problem in a corridor or subarea, resulting in sufficient information to support selection by State and local officials of a locally preferred alternative for adoption into a metropolitan transportation plan, and for the Secretary to make decisions to advance the locally preferred alternative through the project development process, as set forth in 49 CFR part 611 (Major Capital Investment Projects).

Amendment means a revision to a long-range statewide or metropolitan transportation plan, TIP, or STIP that involves a major change to a project included in a metropolitan transportation plan, TIP, or STIP, including the addition or deletion of a project or a major change in project cost, project/project phase initiation dates, or a major change in design concept or design scope (e.g., changing project termini or the number of through traffic lanes). Changes to projects that are included only for illustrative purposes do not require an amendment. An amendment is a revision that requires public review and comment, redemonstration of fiscal constraint, or a conformity determination (for metropolitan transportation plans and TIPs involving "non-exempt" projects in nonattainment and maintenance areas). In the context of a long-range statewide transportation plan, an amendment is a revision approved by the State in accordance with its public involvement process.

Attainment area means any geographic area in which levels of a [*7262] given criteria air pollutant (e.g., ozone, carbon monoxide, PM10, PM2.5, and nitrogen dioxide) meet the health-based National Ambient Air Quality Standards (NAAQS) for that pollutant. An area may be an attainment area for one pollutant and a nonattainment area for others. A "maintenance area" (see definition below) is not considered an attainment area for transportation planning purposes.

Available funds means funds derived from an existing source dedicated to or historically used for transportation purposes. For Federal funds, authorized and/or appropriated funds and the extrapolation of formula and discretionary funds at historic rates of increase are considered "available." A similar approach may be used for State and local funds that are dedicated to or historically used for transportation purposes.

Committed funds means funds that have been dedicated or obligated for transportation purposes. For State funds that are not dedicated to transportation purposes, only those funds over which the Governor has control may be considered "committed." Approval of a TIP by the Governor is considered a commitment of those funds over which the Governor has control. For local or private sources of funds not dedicated to or historically used for transportation purposes (including donations of property), a commitment in writing (e.g., letter of intent) by the responsible official or body having control of the funds may be considered a commitment. For projects involving *49 U.S.C. 5309* funding, execution of a Full Funding Grant Agreement (or equivalent) or a Project Construction Grant Agreement with the USDOT shall be considered a multi-year commitment of Federal funds.

Conformity means a Clean Air Act (*42 U.S.C. 7506(c)*) requirement that ensures that Federal funding and approval are given to transportation plans, programs and projects that are consistent with the air quality goals established by a State Implementation Plan (SIP). Conformity, to the purpose of the SIP, means that transportation activities will not cause new air quality violations, worsen existing violations, or delay timely attainment of the NAAQS. The transportation conformity rule (40 CFR part 93) sets forth policy, criteria, and procedures for demonstrating and assuring conformity of transportation activities.

Conformity lapse means, pursuant to section 176(c) of the Clean Air Act (*42 U.S.C. 7506(c)*), as amended, that the conformity determination for a metropolitan transportation plan or TIP has expired and thus there is no currently conforming metropolitan transportation plan or TIP.

Congestion management process means a systematic approach required in transportation management areas (TMAs) that provides for effective management and operation, based on a cooperatively developed and implemented metropolitan-wide strategy, of new and existing transportation facilities eligible for funding under title 23 U.S.C., and title 49 U.S.C., through the use of operational management strategies.

Consideration means that one or more parties takes into account the opinions, action, and relevant information from other parties in making a decision or determining a course of action.

Consultation means that one or more parties confer with other identified parties in accordance with an established process and, prior to taking action(s), considers the views of the other parties and periodically informs them about action(s) taken. This definition does not apply to the "consultation" performed by the States and the MPOs in comparing the long-range statewide transportation plan and the metropolitan transportation plan, respectively, to State and Tribal conservation plans or maps or inventories of natural or historic resources (see § 450.214(i) and § 450.322(g)(1) and (g)(2)).

Cooperation means that the parties involved in carrying out the transportation planning and programming processes work together to achieve a common goal or objective.

Coordinated public transit-human services transportation plan means a locally developed, coordinated transportation plan that identifies the transportation needs of individuals with disabilities, older adults, and people with low incomes, provides strategies for meeting those local needs, and prioritizes transportation services for funding and implementation.

Coordination means the cooperative development of plans, programs, and schedules among agencies and entities with legal standing and adjustment of such plans, programs, and schedules to achieve general consistency, as appropriate.

Design concept means the type of facility identified for a transportation improvement project (e.g., freeway, expressway, arterial highway, grade-separated highway, toll road, reserved right-of-way rail transit, mixed-traffic rail transit, or busway).

Design scope means the aspects that will affect the proposed facility's impact on the region, usually as they relate to vehicle or person carrying capacity and control (e.g., number of lanes or tracks to be constructed or added, length of project, signalization, safety features, access control including approximate number and location of interchanges, or preferential treatment for high-occupancy vehicles).

Designated recipient means an entity designated, in accordance with the planning process under *49 U.S.C. 5303*, *5304*, and *5306*, by the chief executive officer of a State, responsible local officials, and publicly-owned operators of public transportation, to receive and apportion amounts under *49 U.S.C. 5336* that are attributable to transportation

management areas (TMAs) identified under *49 U.S.C. 5303*, or a State regional authority if the authority is responsible under the laws of a State for a capital project and for financing and directly providing public transportation.

Environmental mitigation activities means strategies, policies, programs, actions, and activities that, over time, will serve to avoid, minimize, or compensate for (by replacing or providing substitute resources) the impacts to or disruption of elements of the human and natural environment associated with the implementation of a long-range statewide transportation plan or metropolitan transportation plan. The human and natural environment includes, for example, neighborhoods and communities, homes and businesses, cultural resources, parks and recreation areas, wetlands and water sources, forested and other natural areas, agricultural areas, endangered and threatened species, and the ambient air. The environmental mitigation strategies and activities are intended to be regional in scope, and may not necessarily address potential project-level impacts.

Federal land management agency means units of the Federal Government currently responsible for the administration of public lands (e.g., U.S. Forest Service, U.S. Fish and Wildlife Service, Bureau of Land Management, and the National Park Service).

Federally funded non-emergency transportation services means transportation services provided to the general public, including those with special transport needs, by public transit, private non-profit service providers, and private third-party contractors to public agencies.

Financial plan means documentation required to be included with a metropolitan transportation plan and TIP (and optional for the long-range statewide transportation plan and STIP) that demonstrates the consistency [*7263] between reasonably available and projected sources of Federal, State, local, and private revenues and the costs of implementing proposed transportation system improvements.

Financially constrained or Fiscal constraint means that the metropolitan transportation plan, TIP, and STIP includes sufficient financial information for demonstrating that projects in the metropolitan transportation plan, TIP, and STIP can be implemented using committed, available, or reasonably available revenue sources, with reasonable assurance that the federally supported transportation system is being adequately operated and maintained. For the TIP and the STIP, financial constraint/fiscal constraint applies to each program year. Additionally, projects in air quality nonattainment and maintenance areas can be included in the first two years of the TIP and STIP only if funds are "available" or "committed."

Freight shippers means any business that routinely transports its products from one location to another by providers of freight transportation services or by its own vehicle fleet.

Full funding grant agreement means an instrument that defines the scope of a project, the Federal financial contribution, and other terms and conditions for funding New Starts projects as required by *49 U.S.C. 5309(d)(1)*.

Governor means the Governor of any of the 50 States or the Commonwealth of Puerto Rico or the Mayor of the District of Columbia.

Illustrative project means an additional transportation project that may (but is not required to) be included in a financial plan for a metropolitan transportation plan, TIP, or STIP if reasonable additional resources were to become available.

Indian Tribal government means a duly formed governing body for an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian Tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, Public Law 103-454.

Intelligent transportation system (ITS) means electronics, photonics, communications, or information processing used singly or in combination to improve the efficiency or safety of a surface transportation system.

Interim metropolitan transportation plan means a transportation plan composed of projects eligible to proceed under a conformity lapse and otherwise meeting all other applicable provisions of this part, including approval by the MPO.

Interim transportation improvement program (TIP) means a TIP composed of projects eligible to proceed under a conformity lapse and otherwise meeting all other applicable provisions of this part, including approval by the MPO and the Governor.

Long-range statewide transportation plan means the official, statewide, multimodal, transportation plan covering a period of no less than 20 years developed through the statewide transportation planning process.

Maintenance area means any geographic region of the United States that the EPA previously designated as a nonattainment area for one or more pollutants pursuant to the Clean Air Act Amendments of 1990, and subsequently redesignated as an attainment area subject to the requirement to develop a maintenance plan under section 175A of the Clean Air Act, as amended.

Management system means a systematic process, designed to assist decisionmakers in selecting cost effective strategies/actions to improve the efficiency or safety of, and protect the investment in the nation's infrastructure. A management system can include: Identification of performance measures; data collection and analysis; determination of needs; evaluation and selection of appropriate strategies/actions to address the needs; and evaluation of the effectiveness of the implemented strategies/actions.

Metropolitan planning area (MPA) means the geographic area determined by agreement between the metropolitan planning organization (MPO) for the area and the Governor, in which the metropolitan transportation planning process is carried out.

Metropolitan planning organization (MPO) means the policy board of an organization created and designated to carry out the metropolitan transportation planning process.

Metropolitan transportation plan means the official multimodal transportation plan addressing no less than a 20-year planning horizon that is developed, adopted, and updated by the MPO through the metropolitan transportation planning process.

National ambient air quality standard (NAAQS) means those standards established pursuant to section 109 of the Clean Air Act.

Nonattainment area means any geographic region of the United States that has been designated by the EPA as a nonattainment area under section 107 of the Clean Air Act for any pollutants for which an NAAQS exists.

Non-metropolitan area means a geographic area outside a designated metropolitan planning area.

Non-metropolitan local officials means elected and appointed officials of general purpose local government in a non-metropolitan area with responsibility for transportation.

Obligated projects means strategies and projects funded under title 23 U.S.C. and title 49 U.S.C. Chapter 53 for which the supporting Federal funds were authorized and committed by the State or designated recipient in the preceding program year, and authorized by the FHWA or awarded as a grant by the FTA.

Operational and management strategies means actions and strategies aimed at improving the performance of existing and planned transportation facilities to relieve congestion and maximizing the safety and mobility of people and goods.

Project construction grant agreement means an instrument that defines the scope of a project, the Federal financial contribution, and other terms and conditions for funding Small Starts projects as required by *49 U.S.C. 5309(e)(7).*

Project selection means the procedures followed by MPOs, States, and public transportation operators to advance projects from the first four years of an approved TIP and/or STIP to implementation, in accordance with agreed upon procedures.

Provider of freight transportation services means any entity that transports or otherwise facilitates the movement of goods from one location to another for others or for itself.

Public transportation operator means the public entity which participates in the continuing, cooperative, and comprehensive transportation planning process in accordance with *23 U.S.C. 134* and *135* and *49 U.S.C. 5303* and *5304*, and is the designated recipient of Federal funds under title 49 U.S.C. Chapter 53 for transportation by a conveyance that provides regular and continuing general or special transportation to the public, but does not include school bus, charter, or intercity bus transportation or intercity passenger rail transportation provided by Amtrak.

Regional ITS architecture means a regional framework for ensuring institutional agreement and technical integration for the implementation of ITS projects or groups of projects.

Regionally significant project means a transportation project (other than projects that may be grouped in the TIP and/or STIP or exempt projects as defined in EPA's transportation [*7264] conformity regulation (40 CFR part 93)) that is on a facility which serves regional transportation needs (such as access to and from the area outside the region; major activity centers in the region; major planned developments such as new retail malls, sports complexes, or employment centers; or transportation terminals) and would normally be included in the modeling of the metropolitan area's transportation network. At a minimum, this includes all principal arterial highways and all fixed guideway transit facilities that offer a significant alternative to regional highway travel.

Revision means a change to a long-range statewide or metropolitan transportation plan, TIP, or STIP that occurs between scheduled periodic updates. A major revision is an "amendment," while a minor revision is an "administrative modification."

State means any one of the fifty States, the District of Columbia, or Puerto Rico.

State implementation plan (SIP) means, as defined in section 302(q) of the Clean Air Act (CAA), the portion (or portions) of the implementation plan, or most recent revision thereof, which has been approved under section 110 of the CAA, or promulgated under section 110(c) of the CAA, or promulgated or approved pursuant to regulations promulgated under section 301(d) of the CAA and which implements the relevant requirements of the CAA.

Statewide transportation improvement program (STIP) means a statewide prioritized listing/program of transportation projects covering a period of four years that is consistent with the long-range statewide transportation plan, metropolitan transportation plans, and TIPs, and required for projects to be eligible for funding under title 23 U.S.C. and title 49 U.S.C. Chapter 53.

Strategic highway safety plan means a plan developed by the State DOT in accordance with the requirements of *23 U.S.C. 148(a)(6).*

Transportation control measure (TCM) means any measure that is specifically identified and committed to in the applicable SIP that is either one of the types listed in section 108 of the Clean Air Act or any other measure for the purpose of reducing emissions or concentrations of air pollutants from transportation sources by reducing vehicle use or changing traffic flow or congestion conditions. Notwithstanding the above, vehicle technology-based, fuel-based, and maintenance-based measures that control the emissions from vehicles under fixed traffic conditions are not TCMs.

Transportation improvement program (TIP) means a prioritized listing/program of transportation projects covering a period of four years that is developed and formally adopted by an MPO as part of the metropolitan transportation planning process, consistent with the metropolitan transportation plan, and required for projects to be eligible for funding under title 23 U.S.C. and title 49 U.S.C. Chapter 53.

Transportation management area (TMA) means an urbanized area with a population over 200,000, as defined by the Bureau of the Census and designated by the Secretary of Transportation, or any additional area where TMA designation is requested by the Governor and the MPO and designated by the Secretary of Transportation.

Unified planning work program (UPWP) means a statement of work identifying the planning priorities and activities to be carried out within a metropolitan planning area. At a minimum, a UPWP includes a description of the planning work and resulting products, who will perform the work, time frames for completing the work, the cost of the work, and the source(s) of funds.

Update means making current a long-range statewide transportation plan, metropolitan transportation plan, TIP, or STIP through a comprehensive review. Updates require public review and comment, a 20-year horizon year for metropolitan transportation plans and long-range statewide transportation plans, a four-year program period for TIPs and STIPs, demonstration of fiscal constraint (except for long-range statewide transportation plans), and a conformity determination (for metropolitan transportation plans and TIPs in nonattainment and maintenance areas).

Urbanized area means a geographic area with a population of 50,000 or more, as designated by the Bureau of the Census.

Users of public transportation means any person, or groups representing such persons, who use transportation open to the general public, other than taxis and other privately funded and operated vehicles.

Visualization techniques means methods used by States and MPOs in the development of transportation plans and programs with the public, elected and appointed officials, and other stakeholders in a clear and easily accessible format

such as maps, pictures, and/or displays, to promote improved understanding of existing or proposed transportation plans and programs.

Subpart B--Statewide Transportation Planning and Programming

§ 450.200 Purpose.

The purpose of this subpart is to implement the provisions of *23 U.S.C. 135* and *49 U.S.C. 5304*, as amended, which require each State to carry out a continuing, cooperative, and comprehensive statewide multimodal transportation planning process, including the development of a long-range statewide transportation plan and statewide transportation improvement program (STIP), that facilitates the safe and efficient management, operation, and development of surface transportation systems that will serve the mobility needs of people and freight (including accessible pedestrian walk-ways and bicycle transportation facilities) and that fosters economic growth and development within and between States and urbanized areas, while minimizing transportation-related fuel consumption and air pollution in all areas of the State, including those areas subject to the metropolitan transportation planning requirements of *23 U.S.C. 134* and *49 U.S.C. 5303*.

§ 450.202 Applicability.

The provisions of this subpart are applicable to States and any other organizations or entities (e.g., metropolitan planning organizations (MPOs) and public transportation operators) that are responsible for satisfying the requirements for transportation plans and programs throughout the State pursuant to *23 U.S.C. 135* and *49 U.S.C. 5304*.

§ 450.204 Definitions.

Except as otherwise provided in subpart A of this part, terms defined in *23 U.S.C. 101(a)* and *49 U.S.C. 5302* are used in this subpart as so defined.

§ 450.206 Scope of the statewide transportation planning process.

(a) Each State shall carry out a continuing, cooperative, and comprehensive statewide transportation planning process that provides for consideration and implementation of projects, strategies, and services that will address the following factors:

(1) Support the economic vitality of the United States, the States, metropolitan areas, and non-metropolitan areas, especially by enabling global competitiveness, productivity, and efficiency;

(2) Increase the safety of the transportation system for motorized and non-motorized users;

(3) Increase the security of the transportation system for motorized and non-motorized users; [*7265]

(4) Increase accessibility and mobility of people and freight;

(5) Protect and enhance the environment, promote energy conservation, improve the quality of life, and promote consistency between transportation improvements and State and local planned growth and economic development patterns;

(6) Enhance the integration and connectivity of the transportation system, across and between modes throughout the State, for people and freight;

(7) Promote efficient system management and operation; and

(8) Emphasize the preservation of the existing transportation system.

(b) Consideration of the planning factors in paragraph (a) of this section shall be reflected, as appropriate, in the statewide transportation planning process. The degree of consideration and analysis of the factors should be based on the scale and complexity of many issues, including transportation systems development, land use, employment, economic development, human and natural environment, and housing and community development.

(c) The failure to consider any factor specified in paragraph (a) of this section shall not be reviewable by any court under *title 23 U.S.C., 49* U.S.C. Chapter 53, subchapter II of title 5 U.S.C. Chapter 5, or title 5 U.S.C Chapter 7 in any

matter affecting a long-range statewide transportation plan, STIP, project or strategy, or the statewide transportation planning process findings.

(d) Funds provided under *23 U.S.C. 505* and *49 U.S.C. 5305(e)* are available to the State to accomplish activities in this subpart. At the State's option, funds provided under *23 U.S.C. 104(b)(1)* and (3) and 105 and *49 U.S.C. 5307* may also be used. Statewide transportation planning activities performed with funds provided under title 23 U.S.C. and title 49 U.S.C. Chapter 53 shall be documented in a statewide planning work program in accordance with the provisions of 23 CFR part 420. The work program should include a discussion of the transportation planning priorities facing the State.

§ 450.208 Coordination of planning process activities.

(a) In carrying out the statewide transportation planning process, each State shall, at a minimum:

(1) Coordinate planning carried out under this subpart with the metropolitan transportation planning activities carried out under subpart C of this part for metropolitan areas of the State. The State is encouraged to rely on information, studies, or analyses provided by MPOs for portions of the transportation system located in metropolitan planning areas;

(2) Coordinate planning carried out under this subpart with statewide trade and economic development planning activities and related multistate planning efforts;

(3) Consider the concerns of Federal land management agencies that have jurisdiction over land within the boundaries of the State;

(4) Consider the concerns of local elected and appointed officials with responsibilities for transportation in non-metropolitan areas;

(5) Consider the concerns of Indian Tribal governments that have jurisdiction over land within the boundaries of the State;

(6) Consider related planning activities being conducted outside of metropolitan planning areas and between States; and

(7) Coordinate data collection and analyses with MPOs and public transportation operators to support statewide transportation planning and programming priorities and decisions.

(b) The State air quality agency shall coordinate with the State department of transportation (State DOT) to develop the transportation portion of the State Implementation Plan (SIP) consistent with the Clean Air Act (*42 U.S.C. 7401 et seq.*).

(c) Two or more States may enter into agreements or compacts, not in conflict with any law of the United States, for cooperative efforts and mutual assistance in support of activities under this subpart related to interstate areas and localities in the States and establishing authorities the States consider desirable for making the agreements and compacts effective. The right to alter, amend, or repeal interstate compacts entered into under this part is expressly reserved.

(d) States may use any one or more of the management systems (in whole or in part) described in 23 CFR part 500.

(e) States may apply asset management principles and techniques in establishing planning goals, defining STIP priorities, and assessing transportation investment decisions, including transportation system safety, operations, preservation, and maintenance.

(f) The statewide transportation planning process shall (to the maximum extent practicable) be consistent with the development of applicable regional intelligent transportation systems (ITS) architectures, as defined in 23 CFR part 940.

(g) Preparation of the coordinated public transit-human services transportation plan, as required by *49 U.S.C. 5310*, *5316*, and *5317*, should be coordinated and consistent with the statewide transportation planning process.

(h) The statewide transportation planning process should be consistent with the Strategic Highway Safety Plan, as specified in *23 U.S.C. 148*, and other transit safety and security planning and review processes, plans, and programs, as appropriate.

§ 450.210 Interested parties, public involvement, and consultation.

(a) In carrying out the statewide transportation planning process, including development of the long-range statewide transportation plan and the STIP, the State shall develop and use a documented public involvement process that provides opportunities for public review and comment at key decision points.

(1) The State's public involvement process at a minimum shall:

(i) Establish early and continuous public involvement opportunities that provide timely information about transportation issues and decisionmaking processes to citizens, affected public agencies, representatives of public transportation employees, freight shippers, private providers of transportation, representatives of users of public transportation, representatives of users of pedestrian walkways and bicycle transportation facilities, representatives of the disabled, providers of freight transportation services, and other interested parties;

(ii) Provide reasonable public access to technical and policy information used in the development of the long-range statewide transportation plan and the STIP;

(iii) Provide adequate public notice of public involvement activities and time for public review and comment at key decision points, including but not limited to a reasonable opportunity to comment on the proposed long-range statewide transportation plan and STIP;

(iv) To the maximum extent practicable, ensure that public meetings are held at convenient and accessible locations and times;

(v) To the maximum extent practicable, use visualization techniques to describe the proposed long-range statewide transportation plan and supporting studies;

(vi) To the maximum extent practicable, make public information available in electronically accessible format and means, such as the World Wide Web, as appropriate to afford [*7266] reasonable opportunity for consideration of public information;

(vii) Demonstrate explicit consideration and response to public input during the development of the long-range statewide transportation plan and STIP;

(viii) Include a process for seeking out and considering the needs of those traditionally underserved by existing transportation systems, such as low-income and minority households, who may face challenges accessing employment and other services; and

(ix) Provide for the periodic review of the effectiveness of the public involvement process to ensure that the process provides full and open access to all interested parties and revise the process, as appropriate.

(2) The State shall provide for public comment on existing and proposed processes for public involvement in the development of the long-range statewide transportation plan and the STIP. At a minimum, the State shall allow 45 calendar days for public review and written comment before the procedures and any major revisions to existing procedures are adopted. The State shall provide copies of the approved public involvement process document(s) to the FHWA and the FTA for informational purposes.

(b) The State shall provide for non-metropolitan local official participation in the development of the long-range statewide transportation plan and the STIP. The State shall have a documented process(es) for consulting with non-metropolitan local officials representing units of general purpose local government and/or local officials with responsibility for transportation that is separate and discrete from the public involvement process and provides an opportunity for their participation in the development of the long-range statewide transportation plan and the STIP. Although the FHWA and the FTA shall not review or approve this consultation process(es), copies of the process document(s) shall be provided to the FHWA and the FTA for informational purposes.

(1) At least once every five years (as of February 24, 2006), the State shall review and solicit comments from non-metropolitan local officials and other interested parties for a period of not less than 60 calendar days regarding the effectiveness of the consultation process and any proposed changes. A specific request for comments shall be directed to the State association of counties, State municipal league, regional planning agencies, or directly to non-metropolitan local officials.

(2) The State, at its discretion, shall be responsible for determining whether to adopt any proposed changes. If a proposed change is not adopted, the State shall make publicly available its reasons for not accepting the proposed change, including notification to non-metropolitan local officials or their associations.

(c) For each area of the State under the jurisdiction of an Indian Tribal government, the State shall develop the long-range statewide transportation plan and STIP in consultation with the Tribal government and the Secretary of Interior. States shall, to the extent practicable, develop a documented process(es) that outlines roles, responsibilities, and key decision points for consulting with Indian Tribal governments and Federal land management agencies in the development of the long-range statewide transportation plan and the STIP.

§ 450.212 Transportation planning studies and project development.

(a) Pursuant to section 1308 of the Transportation Equity Act for the 21st Century, TEA-21 (Pub. L. 105-178), a State(s), MPO(s), or public transportation operator(s) may undertake a multimodal, systems-level corridor or subarea planning study as part of the statewide transportation planning process. To the extent practicable, development of these transportation planning studies shall involve consultation with, or joint efforts among, the State(s), MPO(s), and/or public transportation operator(s). The results or decisions of these transportation planning studies may be used as part of the overall project development process consistent with the National Environmental Policy Act (NEPA) of 1969 (*42 U.S.C. 4321 et seq.*) and associated implementing regulations (23 CFR part 771 and 40 CFR parts 1500-1508). Specifically, these corridor or subarea studies may result in producing any of the following for a proposed transportation project:

(1) Purpose and need or goals and objective statement(s);

(2) General travel corridor and/or general mode(s) definition (e.g., highway, transit, or a highway/transit combination);

(3) Preliminary screening of alternatives and elimination of unreasonable alternatives;

(4) Basic description of the environmental setting; and/or

(5) Preliminary identification of environmental impacts and environmental mitigation.

(b) Publicly available documents or other source material produced by, or in support of, the transportation planning process described in this subpart may be incorporated directly or by reference into subsequent NEPA documents, in accordance with *40 CFR 1502.21*, if:

(1) The NEPA lead agencies agree that such incorporation will aid in establishing or evaluating the purpose and need for the Federal action, reasonable alternatives, cumulative or other impacts on the human and natural environment, or mitigation of these impacts; and

(2) The systems-level, corridor, or subarea planning study is conducted with:

(i) Involvement of interested State, local, Tribal, and Federal agencies;

(ii) Public review;

(iii) Reasonable opportunity to comment during the statewide transportation planning process and development of the corridor or subarea planning study;

(iv) Documentation of relevant decisions in a form that is identifiable and available for review during the NEPA scoping process and can be appended to or referenced in the NEPA document; and

(v) The review of the FHWA and the FTA, as appropriate.

(c) By agreement of the NEPA lead agencies, the above integration may be accomplished through tiering (as described in *40 CFR 1502.20*), incorporating the subarea or corridor planning study into the draft Environmental Impact Statement or Environmental Assessment, or other means that the NEPA lead agencies deem appropriate. Additional information to further explain the linkages between the transportation planning and project development/NEPA processes is contained in Appendix A to this part, including an explanation that is non-binding guidance material.

§ 450.214 Development and content of the long-range statewide transportation plan.

(a) The State shall develop a long-range statewide transportation plan, with a minimum 20-year forecast period at the time of adoption, that provides for the development and implementation of the multimodal transportation system for the State. The long-range statewide transportation plan shall consider and include, as applicable, elements and connections between public transportation, non-motorized modes, rail, commercial motor vehicle, waterway, and aviation facilities, particularly with respect to intercity travel.

(b) The long-range statewide transportation plan should include [*7267] capital, operations and management strategies, investments, procedures, and other measures to ensure the preservation and most efficient use of the existing transportation system. The long-range statewide transportation plan may consider projects and strategies that address areas or corridors where current or projected congestion threatens the efficient functioning of key elements of the State's transportation system.

(c) The long-range statewide transportation plan shall reference, summarize, or contain any applicable short-range planning studies; strategic planning and/or policy studies; transportation needs studies; management systems reports; emergency relief and disaster preparedness plans; and any statements of policies, goals, and objectives on issues (e.g., transportation, safety, economic development, social and environmental effects, or energy) that were relevant to the development of the long-range statewide transportation plan.

(d) The long-range statewide transportation plan should include a safety element that incorporates or summarizes the priorities, goals, countermeasures, or projects contained in the Strategic Highway Safety Plan required by *23 U.S.C. 148*.

(e) The long-range statewide transportation plan should include a security element that incorporates or summarizes the priorities, goals, or projects set forth in other transit safety and security planning and review processes, plans, and programs, as appropriate.

(f) Within each metropolitan area of the State, the long-range statewide transportation plan shall be developed in cooperation with the affected MPOs.

(g) For non-metropolitan areas, the long-range statewide transportation plan shall be developed in consultation with affected non-metropolitan officials with responsibility for transportation using the State's consultation process(es) established under § 450.210(b).

(h) For each area of the State under the jurisdiction of an Indian Tribal government, the long-range statewide transportation plan shall be developed in consultation with the Tribal government and the Secretary of the Interior consistent with § 450.210(c).

(i) The long-range statewide transportation plan shall be developed, as appropriate, in consultation with State, Tribal, and local agencies responsible for land use management, natural resources, environmental protection, conservation, and historic preservation. This consultation shall involve comparison of transportation plans to State and Tribal conservation plans or maps, if available, and comparison of transportation plans to inventories of natural or historic resources, if available.

(j) A long-range statewide transportation plan shall include a discussion of potential environmental mitigation activities and potential areas to carry out these activities, including activities that may have the greatest potential to restore and maintain the environmental functions affected by the long-range statewide transportation plan. The discussion may focus on policies, programs, or strategies, rather than at the project level. The discussion shall be developed in consultation with Federal, State, and Tribal land management, wildlife, and regulatory agencies. The State may establish reasonable timeframes for performing this consultation.

(k) In developing and updating the long-range statewide transportation plan, the State shall provide citizens, affected public agencies, representatives of public transportation employees, freight shippers, private providers of transportation, representatives of users of public transportation, representatives of users of pedestrian walkways and bicycle transportation facilities, representatives of the disabled, providers of freight transportation services, and other interested parties with a reasonable opportunity to comment on the proposed long-range statewide transportation plan. In carrying out these requirements, the State shall, to the maximum extent practicable, utilize the public involvement process described under § 450.210(a).

(l) The long-range statewide transportation plan may (but is not required to) include a financial plan that demonstrates how the adopted long-range statewide transportation plan can be implemented, indicates resources from public and private sources that are reasonably expected to be made available to carry out the plan, and recommends any additional financing strategies for needed projects and programs. In addition, for illustrative purposes, the financial plan may (but is not required to) include additional projects that would be included in the adopted long-range statewide transportation plan if additional resources beyond those identified in the financial plan were to become available.

(m) The State shall not be required to select any project from the illustrative list of additional projects included in the financial plan described in paragraph (l) of this section.

(n) The long-range statewide transportation plan shall be published or otherwise made available, including (to the maximum extent practicable) in electronically accessible formats and means, such as the World Wide Web, as described in § 450.210(a).

(o) The State shall continually evaluate, revise, and periodically update the long-range statewide transportation plan, as appropriate, using the procedures in this section for development and establishment of the long-range statewide transportation plan.

(p) Copies of any new or amended long-range statewide transportation plan documents shall be provided to the FHWA and the FTA for informational purposes.

§ 450.216 Development and content of the statewide transportation improvement program (STIP).

(a) The State shall develop a statewide transportation improvement program (STIP) for all areas of the State. The STIP shall cover a period of no less than four years and be updated at least every four years, or more frequently if the Governor elects a more frequent update cycle. However, if the STIP covers more than four years, the FHWA and the FTA will consider the projects in the additional years as informational. In case of difficulties developing a portion of the STIP for a particular area (e.g., metropolitan planning area, nonattainment or maintenance area, or Indian Tribal lands), a partial STIP covering the rest of the State may be developed.

(b) For each metropolitan area in the State, the STIP shall be developed in cooperation with the MPO designated for the metropolitan area. Each metropolitan transportation improvement program (TIP) shall be included without change in the STIP, directly or by reference, after approval of the TIP by the MPO and the Governor. A metropolitan TIP in a nonattainment or maintenance area is subject to a FHWA/FTA conformity finding before inclusion in the STIP. In areas outside a metropolitan planning area but within an air quality nonattainment or maintenance area containing any part of a metropolitan area, projects must be included in the regional emissions analysis that supported the conformity determination of the associated metropolitan TIP before they are added to the STIP.

(c) For each non-metropolitan area in the State, the STIP shall be developed in consultation with affected non-metropolitan local officials with responsibility for transportation using [*7268] the State's consultation process(es) established under § 450.210.

(d) For each area of the State under the jurisdiction of an Indian Tribal government, the STIP shall be developed in consultation with the Tribal government and the Secretary of the Interior.

(e) Federal Lands Highway program TIPs shall be included without change in the STIP, directly or by reference, once approved by the FHWA pursuant to *23 U.S.C. 204(a)* or (j).

(f) The Governor shall provide all interested parties with a reasonable opportunity to comment on the proposed STIP as required by § 450.210(a).

(g) The STIP shall include capital and non-capital surface transportation projects (or phases of projects) within the boundaries of the State proposed for funding under title 23 U.S.C. and title 49 U.S.C. Chapter 53 (including transportation enhancements; Federal Lands Highway program projects; safety projects included in the State's Strategic Highway Safety Plan; trails projects; pedestrian walkways; and bicycle facilities), except the following that may (but are not required to) be included:

(1) Safety projects funded under *23 U.S.C. 402* and *49 U.S.C. 31102*;

(2) Metropolitan planning projects funded under *23 U.S.C. 104(f), 49 U.S.C. 5305(d)*, and *49 U.S.C. 5339*;

(3) State planning and research projects funded under *23 U.S.C. 505* and *49 U.S.C. 5305(e)*;

(4) At the State's discretion, State planning and research projects funded with National Highway System, Surface Transportation Program, and/or Equity Bonus funds;

(5) Emergency relief projects (except those involving substantial functional, locational, or capacity changes);

(6) National planning and research projects funded under *49 U.S.C. 5314*; and

(7) Project management oversight projects funded under *49 U.S.C. 5327*.

(h) The STIP shall contain all regionally significant projects requiring an action by the FHWA or the FTA whether or not the projects are to be funded with 23 U.S.C. Chapters 1 and 2 or title 49 U.S.C. Chapter 53 funds (e.g., addition of an interchange to the Interstate System with State, local, and/or private funds, and congressionally designated projects not funded under title 23 U.S.C. or title 49 U.S.C. Chapter 53). For informational and conformity purposes, the STIP shall include (if appropriate and included in any TIPs) all regionally significant projects proposed to be funded with Federal funds other than those administered by the FHWA or the FTA, as well as all regionally significant projects to be funded with non-Federal funds.

(i) The STIP shall include for each project or phase (e.g., preliminary engineering, environment/NEPA, right-of-way, design, or construction) the following:

(1) Sufficient descriptive material (i.e., type of work, termini, and length) to identify the project or phase;

(2) Estimated total project cost, or a project cost range, which may extend beyond the four years of the STIP;

(3) The amount of Federal funds proposed to be obligated during each program year (for the first year, this includes the proposed category of Federal funds and source(s) of non-Federal funds. For the second, third, and fourth years, this includes the likely category or possible categories of Federal funds and sources of non-Federal funds); and

(4) Identification of the agencies responsible for carrying out the project or phase.

(j) Projects that are not considered to be of appropriate scale for individual identification in a given program year may be grouped by function, work type, and/or geographic area using the applicable classifications under *23 CFR 771.117(c)* and (d) and/or 40 CFR part 93. In nonattainment and maintenance areas, project classifications must be consistent with the "exempt project" classifications contained in the EPA's transportation conformity regulation (40 CFR part 93). In addition, projects proposed for funding under title 23 U.S.C. Chapter 2 that are not regionally significant may be grouped in one line item or identified individually in the STIP.

(k) Each project or project phase included in the STIP shall be consistent with the long-range statewide transportation plan developed under § 450.214 and, in metropolitan planning areas, consistent with an approved metropolitan transportation plan developed under § 450.322.

(l) The STIP may include a financial plan that demonstrates how the approved STIP can be implemented, indicates resources from public and private sources that are reasonably expected to be made available to carry out the STIP, and recommends any additional financing strategies for needed projects and programs. In addition, for illustrative purposes, the financial plan may (but is not required to) include additional projects that would be included in the adopted STIP if reasonable additional resources beyond those identified in the financial plan were to become available. The State is not required to select any project from the illustrative list for implementation, and projects on the illustrative list cannot be advanced to implementation without an action by the FHWA and the FTA on the STIP. Starting December 11, 2007, revenue and cost estimates for the STIP must use an inflation rate(s) to reflect "year of expenditure dollars," based on reasonable financial principles and information, developed cooperatively by the State, MPOs, and public transportation operators.

(m) The STIP shall include a project, or an identified phase of a project, only if full funding can reasonably be anticipated to be available for the project within the time period contemplated for completion of the project. In nonattainment and maintenance areas, projects included in the first two years of the STIP shall be limited to those for which funds are available or committed. Financial constraint of the STIP shall be demonstrated and maintained by year and shall include sufficient financial information to demonstrate which projects are to be implemented using current and/or reasonably available revenues, while federally-supported facilities are being adequately operated and maintained. In the case of proposed funding sources, strategies for ensuring their availability shall be identified in the financial plan consistent with paragraph (l) of this section. For purposes of transportation operations and maintenance, the STIP shall include financial information containing system-level estimates of costs and revenue sources that are reasonably expected to be available to adequately operate and maintain Federal-aid highways (as defined by *23 U.S.C. 101(a)(5)*) and public transportation (as defined by title 49 U.S.C. Chapter 53).

(n) Projects in any of the first four years of the STIP may be advanced in place of another project in the first four years of the STIP, subject to the project selection requirements of § 450.220. In addition, the STIP may be revised at any time under procedures agreed to by the State, MPO(s), and public transportation operator(s) consistent with the

STIP development procedures established in this section, as well as the procedures for participation by interested parties (see § 450.210(a)), subject to FHWA/FTA approval (see § 450.218). Changes that affect fiscal constraint must take place by amendment of the STIP.

(o) In cases that the FHWA and the FTA find a STIP to be fiscally constrained and a revenue source is subsequently removed or substantially reduced (i.e., by legislative or [*7269] administrative actions), the FHWA and the FTA will not withdraw the original determination of fiscal constraint. However, in such cases, the FHWA and the FTA will not act on an updated or amended STIP that does not reflect the changed revenue situation.

§ 450.218 Self-certifications, Federal findings, and Federal approvals.

(a) At least every four years, the State shall submit an updated STIP concurrently to the FHWA and the FTA for joint approval. STIP amendments shall also be submitted to the FHWA and the FTA for joint approval. At the time the entire proposed STIP or STIP amendments are submitted to the FHWA and the FTA for joint approval, the State shall certify that the transportation planning process is being carried out in accordance with all applicable requirements of:

(1) *23 U.S.C. 134* and *135*, *49 U.S.C. 5303* and *5304*, and this part;

(2) Title VI of the Civil Rights Act of 1964, as amended (*42 U.S.C. 2000d-1*) and 49 CFR part 21;

(3) *49 U.S.C. 5332*, prohibiting discrimination on the basis of race, color, creed, national origin, sex, or age in employment or business opportunity;

(4) Section 1101(b) of the SAFETEA-LU (Pub. L. 109-59) and 49 CFR part 26 regarding the involvement of disadvantaged business enterprises in USDOT funded projects;

(5) 23 CFR part 230, regarding implementation of an equal employment opportunity program on Federal and Federal-aid highway construction contracts;

(6) The provisions of the Americans with Disabilities Act of 1990 (*42 U.S.C. 12101 et seq.*) and 49 CFR parts 27, 37, and 38;

(7) In States containing nonattainment and maintenance areas, sections 174 and 176 (c) and (d) of the Clean Air Act, as amended (*42 U.S.C. 7504*, *7506 (c)* and (d)) and 40 CFR part 93;

(8) The Older Americans Act, as amended (*42 U.S.C. 6101*), prohibiting discrimination on the basis of age in programs or activities receiving Federal financial assistance;

(9) *Section 324 of title 23 U.S.C.*, regarding the prohibition of discrimination based on gender; and

(10) Section 504 of the Rehabilitation Act of 1973 (*29 U.S.C. 794*) and 49 CFR part 27 regarding discrimination against individuals with disabilities.

(b) The FHWA and the FTA shall review the STIP or the amended STIP, and make a joint finding on the extent to which the STIP is based on a statewide transportation planning process that meets or substantially meets the requirements of *23 U.S.C. 134* and *135*, *49 U.S.C. 5303* and *5304*, and subparts A, B, and C of this part. Approval of the STIP by the FHWA and the FTA, in its entirety or in part, will be based upon the results of this joint finding.

(1) If the FHWA and the FTA determine that the STIP or amended STIP is based on a statewide transportation planning process that meets or substantially meets the requirements of *23 U.S.C. 135*, *49 U.S.C. 5304*, and this part, the FHWA and the FTA may jointly:

(i) Approve the entire STIP;

(ii) Approve the STIP subject to certain corrective actions being taken; or

(iii) Under special circumstances, approve a partial STIP covering only a portion of the State.

(2) If the FHWA and the FTA jointly determine and document in the planning finding that a submitted STIP or amended STIP does not substantially meet the requirements of *23 U.S.C. 135*, *49 U.S.C. 5304*, and this part for any identified categories of projects, the FHWA and the FTA will not approve the STIP.

(c) The approval period for a new or amended STIP shall not exceed four years. If a State demonstrates, in writing, that extenuating circumstances will delay the submittal of a new or amended STIP past its update deadline, the FHWA

and the FTA will consider and take appropriate action on a request to extend the approval beyond four years for all or part of the STIP for a period not to exceed 180 calendar days. In these cases, priority consideration will be given to projects and strategies involving the operation and management of the multimodal transportation system. Where the request involves projects in a metropolitan planning area(s), the affected MPO(s) must concur in the request. If the delay was due to the development and approval of a metropolitan TIP(s), the affected MPO(s) must provide supporting information, in writing, for the request.

(d) Where necessary in order to maintain or establish highway and transit operations, the FHWA and the FTA may approve operating assistance for specific projects or programs, even though the projects or programs may not be included in an approved STIP.

§ 450.220 Project selection from the STIP.

(a) Except as provided in § 450.216(g) and § 450.218(d), only projects in a FHWA/FTA approved STIP shall be eligible for funds administered by the FHWA or the FTA.

(b) In metropolitan planning areas, transportation projects proposed for funds administered by the FHWA or the FTA shall be selected from the approved STIP in accordance with project selection procedures provided in § 450.330.

(c) In non-metropolitan areas, transportation projects undertaken on the National Highway System, under the Bridge and Interstate Maintenance programs in title 23 U.S.C. and under sections 5310, 5311, 5316, and 5317 of title 49 U.S.C. Chapter 53 shall be selected from the approved STIP by the State in consultation with the affected non-metropolitan local officials with responsibility for transportation.

(d) Federal Lands Highway program projects shall be selected from the approved STIP in accordance with the procedures developed pursuant to *23 U.S.C. 204*.

(e) The projects in the first year of an approved STIP shall constitute an "agreed to" list of projects for subsequent scheduling and implementation. No further action under paragraphs (b) through (d) of this section is required for the implementing agency to proceed with these projects. If Federal funds available are significantly less than the authorized amounts, or where there is significant shifting of projects among years, § 450.330(a) provides for a revised list of "agreed to" projects to be developed upon the request of the State, MPO, or public transportation operator(s). If an implementing agency wishes to proceed with a project in the second, third, or fourth year of the STIP, the procedures in paragraphs (b) through (d) of this section or expedited procedures that provide for the advancement of projects from the second, third, or fourth years of the STIP may be used, if agreed to by all parties involved in the selection process.

§ 450.222 Applicability of NEPA to statewide transportation plans and programs.

Any decision by the Secretary concerning a long-range statewide transportation plan or STIP developed through the processes provided for in *23 U.S.C. 135*, *49 U.S.C. 5304*, and this subpart shall not be considered to be a Federal action subject to review under NEPA.

§ 450.224 Phase-in of new requirements.

(a) Long-range statewide transportation plans and STIPs adopted or approved prior to July 1, 2007 may be developed using the TEA-21 requirements or the provisions and requirements of this part. [*7270]

(b) For STIPs that are developed under TEA-21 requirements prior to July 1, 2007, the FHWA/FTA action (*i.e.*, STIP approval) must be completed no later than June 30, 2007. For long-range statewide transportation plans that are completed under TEA-21 requirements prior to July 1, 2007, the State adoption action must be completed no later than June 30, 2007. If these actions are completed on or after July 1, 2007, the provisions and requirements of this part shall take effect, regardless of when the long-range statewide transportation plan or the STIP were developed.

(c) The applicable action (see paragraph (b) of this section) on any amendments or updates to STIPs or long-range statewide transportation plans on or after July 1, 2007, shall be based on the provisions and requirements of this part. However, administrative modifications may be made to the STIP on or after July 1, 2007 in the absence of meeting the provisions and requirements of this part.

Subpart C--Metropolitan Transportation Planning and Programming

§ 450.300 Purpose.

The purposes of this subpart are to implement the provisions of *23 U.S.C. 134* and *49 U.S.C. 5303*, as amended, which:

(a) Sets forth the national policy that the MPO designated for each urbanized area is to carry out a continuing, cooperative, and comprehensive multimodal transportation planning process, including the development of a metropolitan transportation plan and a transportation improvement program (TIP), that encourages and promotes the safe and efficient development, management, and operation of surface transportation systems to serve the mobility needs of people and freight (including accessible pedestrian walkways and bicycle transportation facilities) and foster economic growth and development, while minimizing transportation-related fuel consumption and air pollution; and

(b) Encourages continued development and improvement of metropolitan transportation planning processes guided by the planning factors set forth in *23 U.S.C. 134(h)* and *49 U.S.C. 5303(h)*.

§ 450.302 Applicability.

The provisions of this subpart are applicable to organizations and entities responsible for the transportation planning and programming processes in metropolitan planning areas.

§ 450.304 Definitions.

Except as otherwise provided in subpart A of this part, terms defined in *23 U.S.C. 101(a)* and *49 U.S.C. 5302* are used in this subpart as so defined.

§ 450.306 Scope of the metropolitan transportation planning process.

(a) The metropolitan transportation planning process shall be continuous, cooperative, and comprehensive, and provide for consideration and implementation of projects, strategies, and services that will address the following factors:

(1) Support the economic vitality of the metropolitan area, especially by enabling global competitiveness, productivity, and efficiency;

(2) Increase the safety of the transportation system for motorized and non-motorized users;

(3) Increase the security of the transportation system for motorized and non-motorized users;

(4) Increase accessibility and mobility of people and freight;

(5) Protect and enhance the environment, promote energy conservation, improve the quality of life, and promote consistency between transportation improvements and State and local planned growth and economic development patterns;

(6) Enhance the integration and connectivity of the transportation system, across and between modes, for people and freight;

(7) Promote efficient system management and operation; and

(8) Emphasize the preservation of the existing transportation system.

(b) Consideration of the planning factors in paragraph (a) of this section shall be reflected, as appropriate, in the metropolitan transportation planning process. The degree of consideration and analysis of the factors should be based on the scale and complexity of many issues, including transportation system development, land use, employment, economic development, human and natural environment, and housing and community development.

(c) The failure to consider any factor specified in paragraph (a) of this section shall not be reviewable by any court under *title 23 U.S.C., 49* U.S.C. Chapter 53, subchapter II of title 5, U.S.C. Chapter 5, or title 5 U.S.C. Chapter 7 in any matter affecting a metropolitan transportation plan, TIP, a project or strategy, or the certification of a metropolitan transportation planning process.

(d) The metropolitan transportation planning process shall be carried out in coordination with the statewide transportation planning process required by *23 U.S.C. 135* and *49 U.S.C. 5304*.

(e) In carrying out the metropolitan transportation planning process, MPOs, States, and public transportation operators may apply asset management principles and techniques in establishing planning goals, defining TIP priorities, and assessing transportation investment decisions, including transportation system safety, operations, preservation, and maintenance, as well as strategies and policies to support homeland security and to safeguard the personal security of all motorized and non-motorized users.

(f) The metropolitan transportation planning process shall (to the maximum extent practicable) be consistent with the development of applicable regional intelligent transportation systems (ITS) architectures, as defined in 23 CFR part 940.

(g) Preparation of the coordinated public transit-human services transportation plan, as required by *49 U.S.C. 5310*, *5316*, and *5317*, should be coordinated and consistent with the metropolitan transportation planning process.

(h) The metropolitan transportation planning process should be consistent with the Strategic Highway Safety Plan, as specified in *23 U.S.C. 148*, and other transit safety and security planning and review processes, plans, and programs, as appropriate.

(i) The FHWA and the FTA shall designate as a transportation management area (TMA) each urbanized area with a population of over 200,000 individuals, as defined by the Bureau of the Census. The FHWA and the FTA shall also designate any additional urbanized area as a TMA on the request of the Governor and the MPO designated for that area.

(j) In an urbanized area not designated as a TMA that is an air quality attainment area, the MPO(s) may propose and submit to the FHWA and the FTA for approval a procedure for developing an abbreviated metropolitan transportation plan and TIP. In developing proposed simplified planning procedures, consideration shall be given to whether the abbreviated metropolitan transportation plan and TIP will achieve the purposes of *23 U.S.C. 134*, *49 U.S.C. 5303*, and these regulations, taking into account the complexity of the transportation problems in the area. The simplified procedures shall be developed by the MPO in cooperation with the State(s) and public transportation operator(s). [*7271]

§ 450.308 Funding for transportation planning and unified planning work programs.

(a) Funds provided under *23 U.S.C. 104(f)*, *49 U.S.C. 5305(d)*, *49 U.S.C. 5307*, and *49 U.S.C. 5339* are available to MPOs to accomplish activities in this subpart. At the State's option, funds provided under *23 U.S.C. 104(b)(1)* and (b)(3) and *23 U.S.C. 105* may also be provided to MPOs for metropolitan transportation planning. In addition, an MPO serving an urbanized area with a population over 200,000, as designated by the Bureau of the Census, may at its discretion use funds sub-allocated under *23 U.S.C. 133(d)(3)(E)* for metropolitan transportation planning activities.

(b) Metropolitan transportation planning activities performed with funds provided under title 23 U.S.C. and title 49 U.S.C. Chapter 53 shall be documented in a unified planning work program (UPWP) or simplified statement of work in accordance with the provisions of this section and 23 CFR part 420.

(c) Except as provided in paragraph (d) of this section, each MPO, in cooperation with the State(s) and public transportation operator(s), shall develop a UPWP that includes a discussion of the planning priorities facing the MPA. The UPWP shall identify work proposed for the next one- or two-year period by major activity and task (including activities that address the planning factors in § 450.306(a)), in sufficient detail to indicate who (e.g., MPO, State, public transportation operator, local government, or consultant) will perform the work, the schedule for completing the work, the resulting products, the proposed funding by activity/task, and a summary of the total amounts and sources of Federal and matching funds.

(d) With the prior approval of the State and the FHWA and the FTA, an MPO in an area not designated as a TMA may prepare a simplified statement of work, in cooperation with the State(s) and the public transportation operator(s), in lieu of a UPWP. A simplified statement of work would include a description of the major activities to be performed during the next one- or two-year period, who (e.g., State, MPO, public transportation operator, local government, or consultant) will perform the work, the resulting products, and a summary of the total amounts and sources of Federal and matching funds. If a simplified statement of work is used, it may be submitted as part of the State's planning work program, in accordance with 23 CFR part 420.

(e) Arrangements may be made with the FHWA and the FTA to combine the UPWP or simplified statement of work with the work program(s) for other Federal planning funds.

(f) Administrative requirements for UPWPs and simplified statements of work are contained in 23 CFR part 420 and FTA Circular C8100.1B (Program Guidance and Application Instructions for Metropolitan Planning Grants).

§ 450.310 Metropolitan planning organization designation and redesignation.

(a) To carry out the metropolitan transportation planning process under this subpart, a metropolitan planning organization (MPO) shall be designated for each urbanized area with a population of more than 50,000 individuals (as determined by the Bureau of the Census).

(b) MPO designation shall be made by agreement between the Governor and units of general purpose local government that together represent at least 75 percent of the affected population (including the largest incorporated city, based on population, as named by the Bureau of the Census) or in accordance with procedures established by applicable State or local law.

(c) Each Governor with responsibility for a portion of a multistate metropolitan area and the appropriate MPOs shall, to the extent practicable, provide coordinated transportation planning for the entire MPA. The consent of Congress is granted to any two or more States to:

(1) Enter into agreements or compacts, not in conflict with any law of the United States, for cooperative efforts and mutual assistance in support of activities authorized under *23 U.S.C. 134* and *49 U.S.C. 5303* as the activities pertain to interstate areas and localities within the States; and

(2) Establish such agencies, joint or otherwise, as the States may determine desirable for making the agreements and compacts effective.

(d) Each MPO that serves a TMA, when designated or redesignated under this section, shall consist of local elected officials, officials of public agencies that administer or operate major modes of transportation in the metropolitan planning area, and appropriate State transportation officials. Where appropriate, MPOs may increase the representation of local elected officials, public transportation agencies, or appropriate State officials on their policy boards and other committees as a means for encouraging greater involvement in the metropolitan transportation planning process, subject to the requirements of paragraph (k) of this section.

(e) To the extent possible, only one MPO shall be designated for each urbanized area or group of contiguous urbanized areas. More than one MPO may be designated to serve an urbanized area only if the Governor(s) and the existing MPO, if applicable, determine that the size and complexity of the urbanized area make designation of more than one MPO appropriate. In those cases where two or more MPOs serve the same urbanized area, the MPOs shall establish official, written agreements that clearly identify areas of coordination and the division of transportation planning responsibilities among the MPOs.

(f) Nothing in this subpart shall be deemed to prohibit an MPO from using the staff resources of other agencies, non-profit organizations, or contractors to carry out selected elements of the metropolitan transportation planning process.

(g) An MPO designation shall remain in effect until an official redesignation has been made in accordance with this section.

(h) An existing MPO may be redesignated only by agreement between the Governor and units of general purpose local government that together represent at least 75 percent of the existing metropolitan planning area population (including the largest incorporated city, based on population, as named by the Bureau of the Census).

(i) Redesignation of an MPO serving a multistate metropolitan planning area requires agreement between the Governors of each State served by the existing MPO and units of general purpose local government that together represent at least 75 percent of the existing metropolitan planning area population (including the largest incorporated city, based on population, as named by the Bureau of the Census).

(j) For the purposes of redesignation, units of general purpose local government may be defined as elected officials from each unit of general purpose local government located within the metropolitan planning area served by the existing MPO.

(k) Redesignation of an MPO (in accordance with the provisions of this section) is required whenever the existing MPO proposes to make:

(1) A substantial change in the proportion of voting members on the existing MPO representing the largest incorporated city, other units of general purpose local government served by the MPO, and the State(s); or

(2) A substantial change in the decisionmaking authority or [*7272] responsibility of the MPO, or in decisionmaking procedures established under MPO by-laws.

(l) The following changes to an MPO do not require a redesignation (as long as they do not trigger a substantial change as described in paragraph (k) of the section):

(1) The identification of a new urbanized area (as determined by the Bureau of the Census) within an existing metropolitan planning area;

(2) Adding members to the MPO that represent new units of general purpose local government resulting from expansion of the metropolitan planning area;

(3) Adding members to satisfy the specific membership requirements for an MPO that serves a TMA; or

(4) Periodic rotation of members representing units of general-purpose local government, as established under MPO by-laws.

§ 450.312 Metropolitan planning area boundaries.

(a) The boundaries of a metropolitan planning area (MPA) shall be determined by agreement between the MPO and the Governor. At a minimum, the MPA boundaries shall encompass the entire existing urbanized area (as defined by the Bureau of the Census) plus the contiguous area expected to become urbanized within a 20-year forecast period for the metropolitan transportation plan. The MPA boundaries may be further expanded to encompass the entire metropolitan statistical area or combined statistical area, as defined by the Office of Management and Budget.

(b) An MPO that serves an urbanized area designated as a nonattainment area for ozone or carbon monoxide under the Clean Air Act (*42 U.S.C. 7401 et seq.*) as of August 10, 2005, shall retain the MPA boundary that existed on August 10, 2005. The MPA boundaries for such MPOs may only be adjusted by agreement of the Governor and the affected MPO in accordance with the redesignation procedures described in § 450.310(h). The MPA boundary for an MPO that serves an urbanized area designated as a nonattainment area for ozone or carbon monoxide under the Clean Air Act (*42 U.S.C. 7401* et seq.) after August 10, 2005 may be established to coincide with the designated boundaries of the ozone and/or carbon monoxide nonattainment area, in accordance with the requirements in § 450.310(b).

(c) An MPA boundary may encompass more than one urbanized area.

(d) MPA boundaries may be established to coincide with the geography of regional economic development and growth forecasting areas.

(e) Identification of new urbanized areas within an existing metropolitan planning area by the Bureau of the Census shall not require redesignation of the existing MPO.

(f) Where the boundaries of the urbanized area or MPA extend across two or more States, the Governors with responsibility for a portion of the multistate area, MPO(s), and the public transportation operator(s) are strongly encouraged to coordinate transportation planning for the entire multistate area.

(g) The MPA boundaries shall not overlap with each other.

(h) Where part of an urbanized area served by one MPO extends into an adjacent MPA, the MPOs shall, at a minimum, establish written agreements that clearly identify areas of coordination and the division of transportation planning responsibilities among and between the MPOs. Alternatively, the MPOs may adjust their existing boundaries so that the entire urbanized area lies within only one MPA. Boundary adjustments that change the composition of the MPO may require redesignation of one or more such MPOs.

(i) The MPA boundaries shall be reviewed after each Census by the MPO (in cooperation with the State and public transportation operator(s)) to determine if existing MPA boundaries meet the minimum statutory requirements for new and updated urbanized area(s), and shall be adjusted as necessary. As appropriate, additional adjustments should be made to reflect the most comprehensive boundary to foster an effective planning process that ensures connectivity between modes, reduces access disadvantages experienced by modal systems, and promotes efficient overall transportation investment strategies.

(j) Following MPA boundary approval by the MPO and the Governor, the MPA boundary descriptions shall be provided for informational purposes to the FHWA and the FTA. The MPA boundary descriptions shall be submitted either as a geo-spatial database or described in sufficient detail to enable the boundaries to be accurately delineated on a map.

§ 450.314 Metropolitan planning agreements.

(a) The MPO, the State(s), and the public transportation operator(s) shall cooperatively determine their mutual responsibilities in carrying out the metropolitan transportation planning process. These responsibilities shall be clearly identified in written agreements among the MPO, the State(s), and the public transportation operator(s) serving the MPA. To the extent possible, a single agreement between all responsible parties should be developed. The written agreement(s) shall include specific provisions for cooperatively developing and sharing information related to the development of financial plans that support the metropolitan transportation plan (see § 450.322) and the metropolitan TIP (see § 450.324) and development of the annual listing of obligated projects (see § 450.332).

(b) If the MPA does not include the entire nonattainment or maintenance area, there shall be a written agreement among the State department of transportation, State air quality agency, affected local agencies, and the MPO describing the process for cooperative planning and analysis of all projects outside the MPA within the nonattainment or maintenance area. The agreement must also indicate how the total transportation-related emissions for the nonattainment or maintenance area, including areas outside the MPA, will be treated for the purposes of determining conformity in accordance with the EPA's transportation conformity rule (40 CFR part 93). The agreement shall address policy mechanisms for resolving conflicts concerning transportation-related emissions that may arise between the MPA and the portion of the nonattainment or maintenance area outside the MPA.

(c) In nonattainment or maintenance areas, if the MPO is not the designated agency for air quality planning under section 174 of the Clean Air Act (*42 U.S.C. 7504*), there shall be a written agreement between the MPO and the designated air quality planning agency describing their respective roles and responsibilities for air quality related transportation planning.

(d) If more than one MPO has been designated to serve an urbanized area, there shall be a written agreement among the MPOs, the State(s), and the public transportation operator(s) describing how the metropolitan transportation planning processes will be coordinated to assure the development of consistent metropolitan transportation plans and TIPs across the MPA boundaries, particularly in cases in which a proposed transportation investment extends across the boundaries of more than one MPA. If any part of the urbanized area is a nonattainment or maintenance area, the agreement also shall include State and local air quality agencies. The [*7273] metropolitan transportation planning processes for affected MPOs should, to the maximum extent possible, reflect coordinated data collection, analysis, and planning assumptions across the MPAs. Alternatively, a single metropolitan transportation plan and/or TIP for the entire urbanized area may be developed jointly by the MPOs in cooperation with their respective planning partners. Coordination efforts and outcomes shall be documented in subsequent transmittals of the UPWP and other planning products, including the metropolitan transportation plan and TIP, to the State(s), the FHWA, and the FTA.

(e) Where the boundaries of the urbanized area or MPA extend across two or more States, the Governors with responsibility for a portion of the multistate area, the appropriate MPO(s), and the public transportation operator(s) shall coordinate transportation planning for the entire multistate area. States involved in such multistate transportation planning may:

(1) Enter into agreements or compacts, not in conflict with any law of the United States, for cooperative efforts and mutual assistance in support of activities authorized under this section as the activities pertain to interstate areas and localities within the States; and

(2) Establish such agencies, joint or otherwise, as the States may determine desirable for making the agreements and compacts effective.

(f) If part of an urbanized area that has been designated as a TMA overlaps into an adjacent MPA serving an urbanized area that is not designated as a TMA, the adjacent urbanized area shall not be treated as a TMA. However, a written agreement shall be established between the MPOs with MPA boundaries including a portion of the TMA, which clearly identifies the roles and responsibilities of each MPO in meeting specific TMA requirements (e.g., congestion management process, Surface Transportation Program funds suballocated to the urbanized area over 200,000 population, and project selection).

§ 450.316 Interested parties, participation, and consultation.

(a) The MPO shall develop and use a documented participation plan that defines a process for providing citizens, affected public agencies, representatives of public transportation employees, freight shippers, providers of freight transportation services, private providers of transportation, representatives of users of public transportation, representatives of users of pedestrian walkways and bicycle transportation facilities, representatives of the disabled, and other interested parties with reasonable opportunities to be involved in the metropolitan transportation planning process.

(1) The participation plan shall be developed by the MPO in consultation with all interested parties and shall, at a minimum, describe explicit procedures, strategies, and desired outcomes for:

(i) Providing adequate public notice of public participation activities and time for public review and comment at key decision points, including but not limited to a reasonable opportunity to comment on the proposed metropolitan transportation plan and the TIP;

(ii) Providing timely notice and reasonable access to information about transportation issues and processes;

(iii) Employing visualization techniques to describe metropolitan transportation plans and TIPs;

(iv) Making public information (technical information and meeting notices) available in electronically accessible formats and means, such as the World Wide Web;

(v) Holding any public meetings at convenient and accessible locations and times;

(vi) Demonstrating explicit consideration and response to public input received during the development of the metropolitan transportation plan and the TIP;

(vii) Seeking out and considering the needs of those traditionally underserved by existing transportation systems, such as low-income and minority households, who may face challenges accessing employment and other services;

(viii) Providing an additional opportunity for public comment, if the final metropolitan transportation plan or TIP differs significantly from the version that was made available for public comment by the MPO and raises new material issues which interested parties could not reasonably have foreseen from the public involvement efforts;

(ix) Coordinating with the statewide transportation planning public involvement and consultation processes under subpart B of this part; and

(x) Periodically reviewing the effectiveness of the procedures and strategies contained in the participation plan to ensure a full and open participation process.

(2) When significant written and oral comments are received on the draft metropolitan transportation plan and TIP (including the financial plans) as a result of the participation process in this section or the interagency consultation process required under the EPA transportation conformity regulations (40 CFR part 93), a summary, analysis, and report on the disposition of comments shall be made as part of the final metropolitan transportation plan and TIP.

(3) A minimum public comment period of 45 calendar days shall be provided before the initial or revised participation plan is adopted by the MPO. Copies of the approved participation plan shall be provided to the FHWA and the FTA for informational purposes and shall be posted on the World Wide Web, to the maximum extent practicable.

(b) In developing metropolitan transportation plans and TIPs, the MPO should consult with agencies and officials responsible for other planning activities within the MPA that are affected by transportation (including State and local planned growth, economic development, environmental protection, airport operations, or freight movements) or coordinate its planning process (to the maximum extent practicable) with such planning activities. In addition, metropolitan transportation plans and TIPs shall be developed with due consideration of other related planning activities within the metropolitan area, and the process shall provide for the design and delivery of transportation services within the area that are provided by:

(1) Recipients of assistance under title 49 U.S.C. Chapter 53;

(2) Governmental agencies and non-profit organizations (including representatives of the agencies and organizations) that receive Federal assistance from a source other than the U.S. Department of Transportation to provide non-emergency transportation services; and

(3) Recipients of assistance under *23 U.S.C. 204*.

(c) When the MPA includes Indian Tribal lands, the MPO shall appropriately involve the Indian Tribal government(s) in the development of the metropolitan transportation plan and the TIP.

(d) When the MPA includes Federal public lands, the MPO shall appropriately involve the Federal land management agencies in the development of the metropolitan transportation plan and the TIP.

(e) MPOs shall, to the extent practicable, develop a documented process(es) that outlines roles, responsibilities, and key decision points for consulting with other governments and agencies, as defined in paragraphs (b), (c), and (d) of this section, which [*7274] may be included in the agreement(s) developed under § 450.314.

§ 450.318 Transportation planning studies and project development.

(a) Pursuant to section 1308 of the Transportation Equity Act for the 21st Century, TEA-21 (Pub. L. 105-178), an MPO(s), State(s), or public transportation operator(s) may undertake a multimodal, systems-level corridor or subarea planning study as part of the metropolitan transportation planning process. To the extent practicable, development of these transportation planning studies shall involve consultation with, or joint efforts among, the MPO(s), State(s), and/or public transportation operator(s). The results or decisions of these transportation planning studies may be used as part of the overall project development process consistent with the National Environmental Policy Act (NEPA) of 1969 (*42 U.S.C. 4321 et seq.*) and associated implementing regulations (23 CFR part 771 and 40 CFR parts 1500-1508). Specifically, these corridor or subarea studies may result in producing any of the following for a proposed transportation project:

(1) Purpose and need or goals and objective statement(s);

(2) General travel corridor and/or general mode(s) definition (e.g., highway, transit, or a highway/transit combination);

(3) Preliminary screening of alternatives and elimination of unreasonable alternatives;

(4) Basic description of the environmental setting; and/or

(5) Preliminary identification of environmental impacts and environmental mitigation.

(b) Publicly available documents or other source material produced by, or in support of, the transportation planning process described in this subpart may be incorporated directly or by reference into subsequent NEPA documents, in accordance with *40 CFR 1502.21*, if:

(1) The NEPA lead agencies agree that such incorporation will aid in establishing or evaluating the purpose and need for the Federal action, reasonable alternatives, cumulative or other impacts on the human and natural environment, or mitigation of these impacts; and

(2) The systems-level, corridor, or subarea planning study is conducted with:

(i) Involvement of interested State, local, Tribal, and Federal agencies;

(ii) Public review;

(iii) Reasonable opportunity to comment during the metropolitan transportation planning process and development of the corridor or subarea planning study;

(iv) Documentation of relevant decisions in a form that is identifiable and available for review during the NEPA scoping process and can be appended to or referenced in the NEPA document; and

(v) The review of the FHWA and the FTA, as appropriate.

(c) By agreement of the NEPA lead agencies, the above integration may be accomplished through tiering (as described in *40 CFR 1502.20*), incorporating the subarea or corridor planning study into the draft Environmental Impact Statement (EIS) or Environmental Assessment, or other means that the NEPA lead agencies deem appropriate.

(d) For transit fixed guideway projects requiring an Alternatives Analysis (*49 U.S.C. 5309(d)* and (e)), the Alternatives Analysis described in 49 CFR part 611 constitutes the planning required by section 1308 of the TEA-21. The Alternatives Analysis may or may not be combined with the preparation of a NEPA document (e.g., a draft EIS). When an

Alternatives Analysis is separate from the preparation of a NEPA document, the results of the Alternatives Analysis may be used during a subsequent environmental review process as described in paragraph (a).

(e) Additional information to further explain the linkages between the transportation planning and project development/NEPA processes is contained in Appendix A to this part, including an explanation that it is non-binding guidance material.

§ 450.320 Congestion management process in transportation management areas.

(a) The transportation planning process in a TMA shall address congestion management through a process that provides for safe and effective integrated management and operation of the multimodal transportation system, based on a cooperatively developed and implemented metropolitan-wide strategy, of new and existing transportation facilities eligible for funding under title 23 U.S.C. and title 49 U.S.C. Chapter 53 through the use of travel demand reduction and operational management strategies.

(b) The development of a congestion management process should result in multimodal system performance measures and strategies that can be reflected in the metropolitan transportation plan and the TIP. The level of system performance deemed acceptable by State and local transportation officials may vary by type of transportation facility, geographic location (metropolitan area or subarea), and/or time of day. In addition, consideration should be given to strategies that manage demand, reduce single occupant vehicle (SOV) travel, and improve transportation system management and operations. Where the addition of general purpose lanes is determined to be an appropriate congestion management strategy, explicit consideration is to be given to the incorporation of appropriate features into the SOV project to facilitate future demand management strategies and operational improvements that will maintain the functional integrity and safety of those lanes.

(c) The congestion management process shall be developed, established, and implemented as part of the metropolitan transportation planning process that includes coordination with transportation system management and operations activities. The congestion management process shall include:

(1) Methods to monitor and evaluate the performance of the multimodal transportation system, identify the causes of recurring and non-recurring congestion, identify and evaluate alternative strategies, provide information supporting the implementation of actions, and evaluate the effectiveness of implemented actions;

(2) Definition of congestion management objectives and appropriate performance measures to assess the extent of congestion and support the evaluation of the effectiveness of congestion reduction and mobility enhancement strategies for the movement of people and goods. Since levels of acceptable system performance may vary among local communities, performance measures should be tailored to the specific needs of the area and established cooperatively by the State(s), affected MPO(s), and local officials in consultation with the operators of major modes of transportation in the coverage area;

(3) Establishment of a coordinated program for data collection and system performance monitoring to define the extent and duration of congestion, to contribute in determining the causes of congestion, and evaluate the efficiency and effectiveness of implemented actions. To the extent possible, this data collection program should be coordinated with existing data sources (including archived operational/ITS data) and coordinated with operations managers in the metropolitan area; [*7275]

(4) Identification and evaluation of the anticipated performance and expected benefits of appropriate congestion management strategies that will contribute to the more effective use and improved safety of existing and future transportation systems based on the established performance measures. The following categories of strategies, or combinations of strategies, are some examples of what should be appropriately considered for each area:

(i) Demand management measures, including growth management and congestion pricing;

(ii) Traffic operational improvements;

(iii) Public transportation improvements;

(iv) ITS technologies as related to the regional ITS architecture; and

(v) Where necessary, additional system capacity;

(5) Identification of an implementation schedule, implementation responsibilities, and possible funding sources for each strategy (or combination of strategies) proposed for implementation; and

(6) Implementation of a process for periodic assessment of the effectiveness of implemented strategies, in terms of the area's established performance measures. The results of this evaluation shall be provided to decisionmakers and the public to provide guidance on selection of effective strategies for future implementation.

(d) In a TMA designated as nonattainment area for ozone or carbon monoxide pursuant to the Clean Air Act, Federal funds may not be programmed for any project that will result in a significant increase in the carrying capacity for SOVs (i.e., a new general purpose highway on a new location or adding general purpose lanes, with the exception of safety improvements or the elimination of bottlenecks), unless the project is addressed through a congestion management process meeting the requirements of this section.

(e) In TMAs designated as nonattainment for ozone or carbon monoxide, the congestion management process shall provide an appropriate analysis of reasonable (including multimodal) travel demand reduction and operational management strategies for the corridor in which a project that will result in a significant increase in capacity for SOVs (as described in paragraph (d) of this section) is proposed to be advanced with Federal funds. If the analysis demonstrates that travel demand reduction and operational management strategies cannot fully satisfy the need for additional capacity in the corridor and additional SOV capacity is warranted, then the congestion management process shall identify all reasonable strategies to manage the SOV facility safely and effectively (or to facilitate its management in the future). Other travel demand reduction and operational management strategies appropriate for the corridor, but not appropriate for incorporation into the SOV facility itself, shall also be identified through the congestion management process. All identified reasonable travel demand reduction and operational management strategies shall be incorporated into the SOV project or committed to by the State and MPO for implementation.

(f) State laws, rules, or regulations pertaining to congestion management systems or programs may constitute the congestion management process, if the FHWA and the FTA find that the State laws, rules, or regulations are consistent with, and fulfill the intent of, the purposes of *23 U.S.C. 134* and *49 U.S.C. 5303*.

§ 450.322 Development and content of the metropolitan transportation plan.

(a) The metropolitan transportation planning process shall include the development of a transportation plan addressing no less than a 20-year planning horizon as of the effective date. In nonattainment and maintenance areas, the effective date of the transportation plan shall be the date of a conformity determination issued by the FHWA and the FTA. In attainment areas, the effective date of the transportation plan shall be its date of adoption by the MPO.

(b) The transportation plan shall include both long-range and short-range strategies/actions that lead to the development of an integrated multimodal transportation system to facilitate the safe and efficient movement of people and goods in addressing current and future transportation demand.

(c) The MPO shall review and update the transportation plan at least every four years in air quality nonattainment and maintenance areas and at least every five years in attainment areas to confirm the transportation plan's validity and consistency with current and forecasted transportation and land use conditions and trends and to extend the forecast period to at least a 20-year planning horizon. In addition, the MPO may revise the transportation plan at any time using the procedures in this section without a requirement to extend the horizon year. The transportation plan (and any revisions) shall be approved by the MPO and submitted for information purposes to the Governor. Copies of any updated or revised transportation plans must be provided to the FHWA and the FTA.

(d) In metropolitan areas that are in nonattainment for ozone or carbon monoxide, the MPO shall coordinate the development of the metropolitan transportation plan with the process for developing transportation control measures (TCMs) in a State Implementation Plan (SIP).

(e) The MPO, the State(s), and the public transportation operator(s) shall validate data utilized in preparing other existing modal plans for providing input to the transportation plan. In updating the transportation plan, the MPO shall base the update on the latest available estimates and assumptions for population, land use, travel, employment, congestion, and economic activity. The MPO shall approve transportation plan contents and supporting analyses produced by a transportation plan update.

(f) The metropolitan transportation plan shall, at a minimum, include:

(1) The projected transportation demand of persons and goods in the metropolitan planning area over the period of the transportation plan;

(2) Existing and proposed transportation facilities (including major roadways, transit, multimodal and intermodal facilities, pedestrian walkways and bicycle facilities, and intermodal connectors) that should function as an integrated metropolitan transportation system, giving emphasis to those facilities that serve important national and regional transportation functions over the period of the transportation plan. In addition, the locally preferred alternative selected from an Alternatives Analysis under the FTA's Capital Investment Grant program (*49 U.S.C. 5309* and 49 CFR part 611) needs to be adopted as part of the metropolitan transportation plan as a condition for funding under *49 U.S.C. 5309*;

(3) Operational and management strategies to improve the performance of existing transportation facilities to relieve vehicular congestion and maximize the safety and mobility of people and goods;

(4) Consideration of the results of the congestion management process in TMAs that meet the requirements of this subpart, including the identification of SOV projects that result from a congestion management process in TMAs that are nonattainment for ozone or carbon monoxide;

(5) Assessment of capital investment and other strategies to preserve the existing and projected future metropolitan transportation [*7276] infrastructure and provide for multimodal capacity increases based on regional priorities and needs. The metropolitan transportation plan may consider projects and strategies that address areas or corridors where current or projected congestion threatens the efficient functioning of key elements of the metropolitan area's transportation system;

(6) Design concept and design scope descriptions of all existing and proposed transportation facilities in sufficient detail, regardless of funding source, in nonattainment and maintenance areas for conformity determinations under the EPA's transportation conformity rule (40 CFR part 93). In all areas (regardless of air quality designation), all proposed improvements shall be described in sufficient detail to develop cost estimates;

(7) A discussion of types of potential environmental mitigation activities and potential areas to carry out these activities, including activities that may have the greatest potential to restore and maintain the environmental functions affected by the metropolitan transportation plan. The discussion may focus on policies, programs, or strategies, rather than at the project level. The discussion shall be developed in consultation with Federal, State, and Tribal land management, wildlife, and regulatory agencies. The MPO may establish reasonable timeframes for performing this consultation;

(8) Pedestrian walkway and bicycle transportation facilities in accordance with *23 U.S.C. 217(g)*;

(9) Transportation and transit enhancement activities, as appropriate; and

(10) A financial plan that demonstrates how the adopted transportation plan can be implemented.

(i) For purposes of transportation system operations and maintenance, the financial plan shall contain system-level estimates of costs and revenue sources that are reasonably expected to be available to adequately operate and maintain Federal-aid highways (as defined by *23 U.S.C. 101(a)(5)*) and public transportation (as defined by title 49 U.S.C. Chapter 53).

(ii) For the purpose of developing the metropolitan transportation plan, the MPO, public transportation operator(s), and State shall cooperatively develop estimates of funds that will be available to support metropolitan transportation plan implementation, as required under § 450.314(a). All necessary financial resources from public and private sources that are reasonably expected to be made available to carry out the transportation plan shall be identified.

(iii) The financial plan shall include recommendations on any additional financing strategies to fund projects and programs included in the metropolitan transportation plan. In the case of new funding sources, strategies for ensuring their availability shall be identified.

(iv) In developing the financial plan, the MPO shall take into account all projects and strategies proposed for funding under title *23 U.S.C., title 49* U.S.C. Chapter 53 or with other Federal funds; State assistance; local sources; and private participation. Starting December 11, 2007, revenue and cost estimates that support the metropolitan transportation plan must use an inflation rate(s) to reflect "year of expenditure dollars," based on reasonable financial principles and information, developed cooperatively by the MPO, State(s), and public transportation operator(s).

(v) For the outer years of the metropolitan transportation plan (i.e., beyond the first 10 years), the financial plan may reflect aggregate cost ranges/cost bands, as long as the future funding source(s) is reasonably expected to be available to support the projected cost ranges/cost bands.

(vi) For nonattainment and maintenance areas, the financial plan shall address the specific financial strategies required to ensure the implementation of TCMs in the applicable SIP.

(vii) For illustrative purposes, the financial plan may (but is not required to) include additional projects that would be included in the adopted transportation plan if additional resources beyond those identified in the financial plan were to become available.

(viii) In cases that the FHWA and the FTA find a metropolitan transportation plan to be fiscally constrained and a revenue source is subsequently removed or substantially reduced (i.e., by legislative or administrative actions), the FHWA and the FTA will not withdraw the original determination of fiscal constraint; however, in such cases, the FHWA and the FTA will not act on an updated or amended metropolitan transportation plan that does not reflect the changed revenue situation.

(g) The MPO shall consult, as appropriate, with State and local agencies responsible for land use management, natural resources, environmental protection, conservation, and historic preservation concerning the development of the transportation plan. The consultation shall involve, as appropriate:

(1) Comparison of transportation plans with State conservation plans or maps, if available; or

(2) Comparison of transportation plans to inventories of natural or historic resources, if available.

(h) The metropolitan transportation plan should include a safety element that incorporates or summarizes the priorities, goals, countermeasures, or projects for the MPA contained in the Strategic Highway Safety Plan required under *23 U.S.C. 148*, as well as (as appropriate) emergency relief and disaster preparedness plans and strategies and policies that support homeland security (as appropriate) and safeguard the personal security of all motorized and non-motorized users.

(i) The MPO shall provide citizens, affected public agencies, representatives of public transportation employees, freight shippers, providers of freight transportation services, private providers of transportation, representatives of users of public transportation, representatives of users of pedestrian walkways and bicycle transportation facilities, representatives of the disabled, and other interested parties with a reasonable opportunity to comment on the transportation plan using the participation plan developed under § 450.316(a).

(j) The metropolitan transportation plan shall be published or otherwise made readily available by the MPO for public review, including (to the maximum extent practicable) in electronically accessible formats and means, such as the World Wide Web.

(k) A State or MPO shall not be required to select any project from the illustrative list of additional projects included in the financial plan under paragraph (f)(10) of this section.

(l) In nonattainment and maintenance areas for transportation-related pollutants, the MPO, as well as the FHWA and the FTA, must make a conformity determination on any updated or amended transportation plan in accordance with the Clean Air Act and the EPA transportation conformity regulations (40 CFR part 93). During a conformity lapse, MPOs can prepare an interim metropolitan transportation plan as a basis for advancing projects that are eligible to proceed under a conformity lapse. An interim metropolitan transportation plan consisting of eligible projects from, or consistent with, the most recent conforming transportation plan and TIP may proceed immediately without revisiting the requirements of this section, subject to interagency consultation defined in 40 CFR part 93. An interim metropolitan transportation [*7277] plan containing eligible projects that are not from, or consistent with, the most recent conforming transportation plan and TIP must meet all the requirements of this section.

§ 450.324 Development and content of the transportation improvement program (TIP).

(a) The MPO, in cooperation with the State(s) and any affected public transportation operator(s), shall develop a TIP for the metropolitan planning area. The TIP shall cover a period of no less than four years, be updated at least every four years, and be approved by the MPO and the Governor. However, if the TIP covers more than four years, the FHWA and the FTA will consider the projects in the additional years as informational. The TIP may be updated more frequently, but the cycle for updating the TIP must be compatible with the STIP development and approval process. The

TIP expires when the FHWA/FTA approval of the STIP expires. Copies of any updated or revised TIPs must be provided to the FHWA and the FTA. In nonattainment and maintenance areas subject to transportation conformity requirements, the FHWA and the FTA, as well as the MPO, must make a conformity determination on any updated or amended TIP, in accordance with the Clean Air Act requirements and the EPA's transportation conformity regulations (40 CFR part 93).

(b) The MPO shall provide all interested parties with a reasonable opportunity to comment on the proposed TIP as required by § 450.316(a). In addition, in nonattainment area TMAs, the MPO shall provide at least one formal public meeting during the TIP development process, which should be addressed through the participation plan described in § 450.316(a). In addition, the TIP shall be published or otherwise made readily available by the MPO for public review, including (to the maximum extent practicable) in electronically accessible formats and means, such as the World Wide Web, as described in § 450.316(a).

(c) The TIP shall include capital and non-capital surface transportation projects (or phases of projects) within the boundaries of the metropolitan planning area proposed for funding under 23 U.S.C. and 49 U.S.C. Chapter 53 (including transportation enhancements; Federal Lands Highway program projects; safety projects included in the State's Strategic Highway Safety Plan; trails projects; pedestrian walkways; and bicycle facilities), except the following that may (but are not required to) be included:

(1) Safety projects funded under *23 U.S.C. 402* and *49 U.S.C. 31102*;

(2) Metropolitan planning projects funded under *23 U.S.C. 104(f)*, *49 U.S.C. 5305(d)*, and *49 U.S.C. 5339*;

(3) State planning and research projects funded under *23 U.S.C. 505* and *49 U.S.C. 5305(e)*;

(4) At the discretion of the State and MPO, State planning and research projects funded with National Highway System, Surface Transportation Program, and/or Equity Bonus funds;

(5) Emergency relief projects (except those involving substantial functional, locational, or capacity changes);

(6) National planning and research projects funded under *49 U.S.C. 5314*; and

(7) Project management oversight projects funded under *49 U.S.C. 5327*.

(d) The TIP shall contain all regionally significant projects requiring an action by the FHWA or the FTA whether or not the projects are to be funded under title 23 U.S.C. Chapters 1 and 2 or title 49 U.S.C. Chapter 53 (e.g., addition of an interchange to the Interstate System with State, local, and/or private funds and congressionally designated projects not funded under *23 U.S.C. or 49* U.S.C. Chapter 53). For public information and conformity purposes, the TIP shall include all regionally significant projects proposed to be funded with Federal funds other than those administered by the FHWA or the FTA, as well as all regionally significant projects to be funded with non-Federal funds.

(e) The TIP shall include, for each project or phase (e.g., preliminary engineering, environment/NEPA, right-of-way, design, or construction), the following:

(1) Sufficient descriptive material (i.e., type of work, termini, and length) to identify the project or phase;

(2) Estimated total project cost, which may extend beyond the four years of the TIP;

(3) The amount of Federal funds proposed to be obligated during each program year for the project or phase (for the first year, this includes the proposed category of Federal funds and source(s) of non-Federal funds. For the second, third, and fourth years, this includes the likely category or possible categories of Federal funds and sources of non-Federal funds);

(4) Identification of the agencies responsible for carrying out the project or phase;

(5) In nonattainment and maintenance areas, identification of those projects which are identified as TCMs in the applicable SIP;

(6) In nonattainment and maintenance areas, included projects shall be specified in sufficient detail (design concept and scope) for air quality analysis in accordance with the EPA transportation conformity regulation (40 CFR part 93); and

(7) In areas with Americans with Disabilities Act required paratransit and key station plans, identification of those projects that will implement these plans.

(f) Projects that are not considered to be of appropriate scale for individual identification in a given program year may be grouped by function, work type, and/or geographic area using the applicable classifications under *23 CFR 771.117(c)* and (d) and/or 40 CFR part 93. In nonattainment and maintenance areas, project classifications must be consistent with the "exempt project" classifications contained in the EPA transportation conformity regulation (40 CFR part 93). In addition, projects proposed for funding under title 23 U.S.C. Chapter 2 that are not regionally significant may be grouped in one line item or identified individually in the TIP.

(g) Each project or project phase included in the TIP shall be consistent with the approved metropolitan transportation plan.

(h) The TIP shall include a financial plan that demonstrates how the approved TIP can be implemented, indicates resources from public and private sources that are reasonably expected to be made available to carry out the TIP, and recommends any additional financing strategies for needed projects and programs. In developing the TIP, the MPO, State(s), and public transportation operator(s) shall cooperatively develop estimates of funds that are reasonably expected to be available to support TIP implementation, in accordance with § 450.314(a). Only projects for which construction or operating funds can reasonably be expected to be available may be included. In the case of new funding sources, strategies for ensuring their availability shall be identified. In developing the financial plan, the MPO shall take into account all projects and strategies funded under title *23 U.S.C., title 49* U.S.C. Chapter 53 and other Federal funds; and regionally significant projects that are not federally funded. For purposes of transportation operations and maintenance, the financial plan shall contain system-level estimates of costs and revenue sources that are reasonably expected to be available to adequately operate and maintain Federal-aid highways (as defined by *23 U.S.C. 101(a)(5)*) and [*7278] public transportation (as defined by title 49 U.S.C. Chapter 53). In addition, for illustrative purposes, the financial plan may (but is not required to) include additional projects that would be included in the TIP if reasonable additional resources beyond those identified in the financial plan were to become available. Starting [Insert date 270 days after effective date], revenue and cost estimates for the TIP must use an inflation rate(s) to reflect "year of expenditure dollars," based on reasonable financial principles and information, developed cooperatively by the MPO, State(s), and public transportation operator(s).

(i) The TIP shall include a project, or a phase of a project, only if full funding can reasonably be anticipated to be available for the project within the time period contemplated for completion of the project. In nonattainment and maintenance areas, projects included in the first two years of the TIP shall be limited to those for which funds are available or committed. For the TIP, financial constraint shall be demonstrated and maintained by year and shall include sufficient financial information to demonstrate which projects are to be implemented using current and/or reasonably available revenues, while federally supported facilities are being adequately operated and maintained. In the case of proposed funding sources, strategies for ensuring their availability shall be identified in the financial plan consistent with paragraph (h) of this section. In nonattainment and maintenance areas, the TIP shall give priority to eligible TCMs identified in the approved SIP in accordance with the EPA transportation conformity regulation (40 CFR part 93) and shall provide for their timely implementation.

(j) Procedures or agreements that distribute suballocated Surface Transportation Program funds or funds under *49 U.S.C. 5307* to individual jurisdictions or modes within the MPA by pre-determined percentages or formulas are inconsistent with the legislative provisions that require the MPO, in cooperation with the State and the public transportation operator, to develop a prioritized and financially constrained TIP and shall not be used unless they can be clearly shown to be based on considerations required to be addressed as part of the metropolitan transportation planning process.

(k) For the purpose of including projects funded under *49 U.S.C. 5309* in a TIP, the following approach shall be followed:

(1) The total Federal share of projects included in the first year of the TIP shall not exceed levels of funding committed to the MPA; and

(2) The total Federal share of projects included in the second, third, fourth, and/or subsequent years of the TIP may not exceed levels of funding committed, or reasonably expected to be available, to the MPA.

(l) As a management tool for monitoring progress in implementing the transportation plan, the TIP should:

(1) Identify the criteria and process for prioritizing implementation of transportation plan elements (including multimodal trade-offs) for inclusion in the TIP and any changes in priorities from previous TIPs;

(2) List major projects from the previous TIP that were implemented and identify any significant delays in the planned implementation of major projects; and

(3) In nonattainment and maintenance areas, describe the progress in implementing any required TCMs, in accordance with 40 CFR part 93.

(m) During a conformity lapse, MPOs may prepare an interim TIP as a basis for advancing projects that are eligible to proceed under a conformity lapse. An interim TIP consisting of eligible projects from, or consistent with, the most recent conforming metropolitan transportation plan and TIP may proceed immediately without revisiting the requirements of this section, subject to interagency consultation defined in 40 CFR part 93. An interim TIP containing eligible projects that are not from, or consistent with, the most recent conforming transportation plan and TIP must meet all the requirements of this section.

(n) Projects in any of the first four years of the TIP may be advanced in place of another project in the first four years of the TIP, subject to the project selection requirements of § 450.330. In addition, the TIP may be revised at any time under procedures agreed to by the State, MPO(s), and public transportation operator(s) consistent with the TIP development procedures established in this section, as well as the procedures for the MPO participation plan (see § 450.316(a)) and FHWA/FTA actions on the TIP (see § 450.328).

(o) In cases that the FHWA and the FTA find a TIP to be fiscally constrained and a revenue source is subsequently removed or substantially reduced (i.e., by legislative or administrative actions), the FHWA and the FTA will not withdraw the original determination of fiscal constraint. However, in such cases, the FHWA and the FTA will not act on an updated or amended TIP that does not reflect the changed revenue situation.

§ 450.326 TIP revisions and relationship to the STIP.

(a) An MPO may revise the TIP at any time under procedures agreed to by the cooperating parties consistent with the procedures established in this part for its development and approval. In nonattainment or maintenance areas for transportation-related pollutants, if a TIP amendment involves non-exempt projects (per 40 CFR part 93), or is replaced with an updated TIP, the MPO and the FHWA and the FTA must make a new conformity determination. In all areas, changes that affect fiscal constraint must take place by amendment of the TIP. Public participation procedures consistent with § 450.316(a) shall be utilized in revising the TIP, except that these procedures are not required for administrative modifications.

(b) After approval by the MPO and the Governor, the TIP shall be included without change, directly or by reference, in the STIP required under *23 U.S.C. 135*. In nonattainment and maintenance areas, a conformity finding on the TIP must be made by the FHWA and the FTA before it is included in the STIP. A copy of the approved TIP shall be provided to the FHWA and the FTA.

(c) The State shall notify the MPO and Federal land management agencies when a TIP including projects under the jurisdiction of these agencies has been included in the STIP.

§ 450.328 TIP action by the FHWA and the FTA.

(a) The FHWA and the FTA shall jointly find that each metropolitan TIP is consistent with the metropolitan transportation plan produced by the continuing and comprehensive transportation process carried on cooperatively by the MPO(s), the State(s), and the public transportation operator(s) in accordance with *23 U.S.C. 134* and *49 U.S.C. 5303*. This finding shall be based on the self-certification statement submitted by the State and MPO under § 450.334, a review of the metropolitan transportation plan by the FHWA and the FTA, and upon other reviews as deemed necessary by the FHWA and the FTA.

(b) In nonattainment and maintenance areas, the MPO, as well as the FHWA and the FTA, shall determine conformity of any updated or amended TIP, in accordance with 40 CFR part 93. After the FHWA and the FTA issue a conformity determination on the TIP, the TIP shall be incorporated, without change, into the STIP, directly or by reference.

(c) If the metropolitan transportation plan has not been updated in [*7279] accordance with the cycles defined in § 450.322(c), projects may only be advanced from a TIP that was approved and found to conform (in nonattainment and maintenance areas) prior to expiration of the metropolitan transportation plan and meets the TIP update requirements of § 450.324(a). Until the MPO approves (in attainment areas) or the FHWA/FTA issues a conformity determination on (in nonattainment and maintenance areas) the updated metropolitan transportation plan, the TIP may not be amended.

(d) In the case of extenuating circumstances, the FHWA and the FTA will consider and take appropriate action on requests to extend the STIP approval period for all or part of the TIP in accordance with § 450.218(c).

(e) If an illustrative project is included in the TIP, no Federal action may be taken on that project by the FHWA and the FTA until it is formally included in the financially constrained and conforming metropolitan transportation plan and TIP.

(f) Where necessary in order to maintain or establish operations, the FHWA and the FTA may approve highway and transit operating assistance for specific projects or programs, even though the projects or programs may not be included in an approved TIP.

§ 450.330 Project selection from the TIP.

(a) Once a TIP that meets the requirements of *23 U.S.C. 134(j), 49 U.S.C. 5303(j),* and § 450.324 has been developed and approved, the first year of the TIP shall constitute an "agreed to" list of projects for project selection purposes and no further project selection action is required for the implementing agency to proceed with projects, except where the appropriated Federal funds available to the metropolitan planning area are significantly less than the authorized amounts or where there are significant shifting of projects between years. In this case, a revised "agreed to" list of projects shall be jointly developed by the MPO, the State, and the public transportation operator(s) if requested by the MPO, the State, or the public transportation operator(s). If the State or public transportation operator(s) wishes to proceed with a project in the second, third, or fourth year of the TIP, the specific project selection procedures stated in paragraphs (b) and (c) of this section must be used unless the MPO, the State, and the public transportation operator(s) jointly develop expedited project selection procedures to provide for the advancement of projects from the second, third, or fourth years of the TIP.

(b) In metropolitan areas not designated as TMAs, projects to be implemented using title 23 U.S.C. funds (other than Federal Lands Highway program projects) or funds under title 49 U.S.C. Chapter 53, shall be selected by the State and/or the public transportation operator(s), in cooperation with the MPO from the approved metropolitan TIP. Federal Lands Highway program projects shall be selected in accordance with procedures developed pursuant to *23 U.S.C. 204.*

(c) In areas designated as TMAs, all 23 U.S.C. and 49 U.S.C. Chapter 53 funded projects (excluding projects on the National Highway System (NHS) and projects funded under the Bridge, Interstate Maintenance, and Federal Lands Highway programs) shall be selected by the MPO in consultation with the State and public transportation operator(s) from the approved TIP and in accordance with the priorities in the approved TIP. Projects on the NHS and projects funded under the Bridge and Interstate Maintenance programs shall be selected by the State in cooperation with the MPO, from the approved TIP. Federal Lands Highway program projects shall be selected in accordance with procedures developed pursuant to *23 U.S.C. 204*.

(d) Except as provided in § 450.324(c) and § 450.328(f), projects not included in the federally approved STIP shall not be eligible for funding with funds under title *23 U.S.C. or 49* U.S.C. Chapter 53.

(e) In nonattainment and maintenance areas, priority shall be given to the timely implementation of TCMs contained in the applicable SIP in accordance with the EPA transportation conformity regulations (40 CFR part 93).

§ 450.332 Annual listing of obligated projects.

(a) In metropolitan planning areas, on an annual basis, no later than 90 calendar days following the end of the program year, the State, public transportation operator(s), and the MPO shall cooperatively develop a listing of projects (including investments in pedestrian walkways and bicycle transportation facilities) for which funds under *23 U.S.C. or 49* U.S.C. Chapter 53 were obligated in the preceding program year.

(b) The listing shall be prepared in accordance with § 450.314(a) and shall include all federally funded projects authorized or revised to increase obligations in the preceding program year, and shall at a minimum include the TIP information under § 450.324(e)(1) and (4) and identify, for each project, the amount of Federal funds requested in the TIP, the Federal funding that was obligated during the preceding year, and the Federal funding remaining and available for subsequent years.

(c) The listing shall be published or otherwise made available in accordance with the MPO's public participation criteria for the TIP.

§ 450.334 Self-certifications and Federal certifications.

(a) For all MPAs, concurrent with the submittal of the entire proposed TIP to the FHWA and the FTA as part of the STIP approval, the State and the MPO shall certify at least every four years that the metropolitan transportation planning process is being carried out in accordance with all applicable requirements including:

(1) *23 U.S.C. 134*, *49 U.S.C. 5303*, and this subpart;

(2) In nonattainment and maintenance areas, sections 174 and 176 (c) and (d) of the Clean Air Act, as amended (*42 U.S.C. 7504*, *7506 (c)* and (d)) and 40 CFR part 93;

(3) Title VI of the Civil Rights Act of 1964, as amended (*42 U.S.C. 2000d-1*) and 49 CFR part 21;

(4) *49 U.S.C. 5332*, prohibiting discrimination on the basis of race, color, creed, national origin, sex, or age in employment or business opportunity;

(5) Section 1101(b) of the SAFETEA-LU (Pub. L. 109-59) and 49 CFR part 26 regarding the involvement of disadvantaged business enterprises in USDOT funded projects;

(6) 23 CFR part 230, regarding the implementation of an equal employment opportunity program on Federal and Federal-aid highway construction contracts;

(7) The provisions of the Americans with Disabilities Act of 1990 (*42 U.S.C. 12101 et seq.*) and 49 CFR parts 27, 37, and 38;

(8) The Older Americans Act, as amended (*42 U.S.C. 6101*), prohibiting discrimination on the basis of age in programs or activities receiving Federal financial assistance;

(9) *Section 324 of title 23 U.S.C.* regarding the prohibition of discrimination based on gender; and

(10) Section 504 of the Rehabilitation Act of 1973 (*29 U.S.C. 794*) and 49 CFR part 27 regarding discrimination against individuals with disabilities.

(b) In TMAs, the FHWA and the FTA jointly shall review and evaluate the transportation planning process for each TMA no less than once every four years to determine if the process meets the requirements of applicable provisions of Federal law and this subpart.

(1) After review and evaluation of the TMA planning process, the FHWA and [*7280] FTA shall take one of the following actions:

(i) If the process meets the requirements of this part and a TIP has been approved by the MPO and the Governor, jointly certify the transportation planning process;

(ii) If the process substantially meets the requirements of this part and a TIP has been approved by the MPO and the Governor, jointly certify the transportation planning process subject to certain specified corrective actions being taken; or

(iii) If the process does not meet the requirements of this part, jointly certify the planning process as the basis for approval of only those categories of programs or projects that the FHWA and the FTA jointly determine, subject to certain specified corrective actions being taken.

(2) If, upon the review and evaluation conducted under paragraph (b)(1)(iii) of this section, the FHWA and the FTA do not certify the transportation planning process in a TMA, the Secretary may withhold up to 20 percent of the funds attributable to the metropolitan planning area of the MPO for projects funded under title 23 U.S.C. and title 49 U.S.C. Chapter 53 in addition to corrective actions and funding restrictions. The withheld funds shall be restored to the MPA when the metropolitan transportation planning process is certified by the FHWA and FTA, unless the funds have lapsed.

(3) A certification of the TMA planning process will remain in effect for four years unless a new certification determination is made sooner by the FHWA and the FTA or a shorter term is specified in the certification report.

(4) In conducting a certification review, the FHWA and the FTA shall provide opportunities for public involvement within the metropolitan planning area under review. The FHWA and the FTA shall consider the public input received in arriving at a decision on a certification action.

(5) The MPO(s), the State(s), and public transportation operator(s) shall be notified of the actions taken under paragraphs (b)(1) and (b)(2) of this section. The FHWA and the FTA will update the certification status of the TMA when evidence of satisfactory completion of a corrective action(s) is provided to the FHWA and the FTA.

§ 450.336 Applicability of NEPA to metropolitan transportation plans and programs.

Any decision by the Secretary concerning a metropolitan transportation plan or TIP developed through the processes provided for in *23 U.S.C. 134*, *49 U.S.C. 5303*, and this subpart shall not be considered to be a Federal action subject to review under NEPA.

§ 450.338 Phase-in of new requirements.

(a) Metropolitan transportation plans and TIPs adopted or approved prior to July 1, 2007 may be developed using the TEA-21 requirements or the provisions and requirements of this part.

(b) For metropolitan transportation plans and TIPs that are developed under TEA-21 requirements prior to July 1, 2007, the FHWA/FTA action (i.e., conformity determinations and STIP approvals) must be completed no later than June 30, 2007. For metropolitan transportation plans in attainment areas that are developed under TEA-21 requirements prior to July 1, 2007, the MPO adoption action must be completed no later than June 30, 2007. If these actions are completed on or after July 1, 2007, the provisions and requirements of this part shall take effect, regardless of when the metropolitan transportation plan or TIP were developed.

(c) On and after July 1, 2007, the FHWA and the FTA will take action on a new TIP developed under the provisions of this part, even if the MPO has not yet adopted a new metropolitan transportation plan under the provisions of this part, as long as the underlying transportation planning process is consistent with the requirements in the SAFETEA-LU.

(d) The applicable action (see paragraph (b) of this section) on any amendments or updates to metropolitan transportation plans and TIPs on or after July 1, 2007, shall be based on the provisions and requirements of this part. However, administrative modifications may be made to the metropolitan transportation plan or TIP on or after July 1, 2007 in the absence of meeting the provisions and requirements of this part.

(e) For new TMAs, the congestion management process described in § 450.320 shall be implemented within 18 months of the designation of a new TMA.

Appendix A to Part 450--Linking the Transportation Planning and NEPA Processes

Background and Overview:

This Appendix provides additional information to explain the linkage between the transportation planning and project development/National Environmental Policy Act (NEPA) processes. It is intended to be non-binding and should not be construed as a rule of general applicability.

For 40 years, the Congress has directed that federally-funded highway and transit projects must flow from metropolitan and statewide transportation planning processes (pursuant to *23 U.S.C. 134*-135 and *49 U.S.C. 5303-5306*). Over the years, the Congress has refined and strengthened the transportation planning process as the foundation for project decisions, emphasizing public involvement, consideration of environmental and other factors, and a Federal role that oversees the transportation planning process but does not second-guess the content of transportation plans and programs.

Despite this statutory emphasis on transportation planning, the environmental analyses produced to meet the requirements of the NEPA of 1969 (*42 U.S.C. 4231 et seq.*) have often been conducted *de novo,* disconnected from the analyses used to develop long-range transportation plans, statewide and metropolitan Transportation Improvement Programs (STIPs/TIPs), or planning-level corridor/subarea/feasibility studies. When the NEPA and transportation planning processes are not well coordinated, the NEPA process may lead to the development of information that is more appropriately developed in the planning process, resulting in duplication of work and delays in transportation improvements.

The purpose of this Appendix is to change this culture, by supporting congressional intent that statewide and metropolitan transportation planning should be the foundation for highway and transit project decisions. This Appendix was crafted to recognize that transportation planning processes vary across the country. This document provides details on

how information, analysis, and products from transportation planning can be incorporated into and relied upon in NEPA documents under existing laws, regardless of when the Notice of Intent has been published. This Appendix presents environmental review as a continuum of sequential study, refinement, and expansion performed in transportation planning and during project development/NEPA, with information developed and conclusions drawn in early stages utilized in subsequent (and more detailed) review stages.

The information below is intended for use by State departments of transportation (State DOTs), metropolitan planning organizations (MPOs), and public transportation operators to clarify the circumstances under which transportation planning level choices and analyses can be adopted or incorporated into the process required by NEPA. Additionally, the FHWA and the FTA will work with Federal environmental, regulatory, and resource agencies to incorporate the principles of this Appendix in their day-to-day NEPA policies and procedures related to their involvement in highway and transit projects.

This Appendix does not extend NEPA requirements to transportation plans and programs. The Transportation Efficiency Act for the 21st Century (TEA-21) and the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) specifically exempted transportation plans and programs from NEPA review. Therefore, initiating the NEPA process as part of, or concurrently with, a [*7281] transportation planning study does not subject transportation plans and programs to NEPA.

Implementation of this Appendix by States, MPOs, and public transportation operators is voluntary. The degree to which studies, analyses, or conclusions from the transportation planning process can be incorporated into the project development/NEPA processes will depend upon how well they meet certain standards established by NEPA regulations and guidance. While some transportation planning processes already meet these standards, others will need some modification.

The remainder of this Appendix document utilizes a "Question and Answer" format, organized into three primary categories ("Procedural Issues," "Substantive Issues," and "Administrative Issues").

I. Procedural Issues:

1. In what format should the transportation planning information be included?

To be included in the NEPA process, work from the transportation planning process must be documented in a form that can be appended to the NEPA document or incorporated by reference. Documents may be incorporated by reference if they are readily available so as to not impede agency or public review of the action. Any document incorporated by reference must be "reasonably available for inspection by potentially interested persons within the time allowed for comment." Incorporated materials must be cited in the NEPA document and their contents briefly described, so that the reader understands why the document is cited and knows where to look for further information. To the extent possible, the documentation should be in a form such as official actions by the MPO, State DOT, or public transportation operator and/or correspondence within and among the organizations involved in the transportation planning process.

2. What is a reasonable level of detail for a planning product that is intended to be used in a NEPA document? How does this level of detail compare to what is considered a full NEPA analysis?

For purposes of transportation planning alone, a planning-level analysis does not need to rise to the level of detail required in the NEPA process. Rather, it needs to be accurate and up-to-date, and should adequately support recommended improvements in the statewide or metropolitan long-range transportation plan. The SAFETEA-LU requires transportation planning processes to focus on setting a context and following acceptable procedures. For example, the SAFETEA-LU requires a "discussion of the types of potential environmental mitigation activities" and potential areas for their implementation, rather than details on specific strategies. The SAFETEA-LU also emphasizes consultation with Federal, State, and Tribal land management, wildlife, and regulatory agencies.

However, the Environmental Assessment (EA) or Environmental Impact Statement (EIS) ultimately will be judged by the standards applicable under the NEPA regulations and guidance from the Council on Environmental Quality (CEQ). To the extent the information incorporated from the transportation planning process, standing alone, does not contain all of the information or analysis required by NEPA, then it will need to be supplemented by other information contained in the EIS or EA that would, in conjunction with the information from the plan, collectively meet the requirements of NEPA. The intent is not to require NEPA studies in the transportation planning process. As an option, the NEPA analyses prepared for project development can be integrated with transportation planning studies (see the response to Question 9 for additional information).

3. What type and extent of involvement from Federal, Tribal, State, and local environmental, regulatory, and resource agencies is needed in the transportation planning process in order for planning-level decisions to be more readily accepted in the NEPA process?

Sections 3005, 3006, and 6001 of the SAFETEA-LU established formal consultation requirements for MPOs and State DOTs to employ with environmental, regulatory, and resource agencies in the development of long-range transportation plans. For example, metropolitan transportation plans now "shall include a discussion of the types of potential environmental mitigation activities and potential areas to carry out these activities, including activities that may have the greatest potential to restore and maintain the environmental functions affected by the [transportation] plan," and that these planning-level discussions "shall be developed in consultation with Federal, State, and Tribal land management, wildlife, and regulatory agencies." In addition, MPOs "shall consult, as appropriate, with State and local agencies responsible for land use management, natural resources, environmental protection, conservation, and historic preservation concerning the development of a long-range transportation plan," and that this consultation "shall involve, as appropriate, comparison of transportation plans with State conservation plans or maps, if available, or comparison of transportation plans to inventories of natural or historic resources, if available." Similar SAFETEA-LU language addresses the development of the long-range statewide transportation plan, with the addition of Tribal conservation plans or maps to this planning-level "comparison."

In addition, section 6002 of the SAFETEA-LU established several mechanisms for increased efficiency in environmental reviews for project decision-making. For example, the term "lead agency" collectively means the U. S. Department of Transportation and a State or local governmental entity serving as a joint lead agency for the NEPA process. In addition, the lead agency is responsible for inviting and designating "participating agencies" (i.e., other Federal or non-Federal agencies that may have an interest in the proposed project). Any Federal agency that is invited by the lead agency to participate in the environmental review process for a project shall be designated as a participating agency by the lead agency unless the invited agency informs the lead agency, in writing, by the deadline specified in the invitation that the invited agency:

(a) Has no jurisdiction or authority with respect to the project; (b) has no expertise or information relevant to the project; and (c) does not intend to submit comments on the project.

Past successful examples of using transportation planning products in NEPA analysis are based on early and continuous involvement of environmental, regulatory, and resource agencies. Without this early coordination, environmental, regulatory, and resource agencies are more likely to expect decisions made or analyses conducted in the transportation planning process to be revisited during the NEPA process. Early participation in transportation planning provides environmental, regulatory, and resource agencies better insight into the needs and objectives of the locality. Additionally, early participation provides an important opportunity for environmental, regulatory, and resource agency concerns to be identified and addressed early in the process, such as those related to permit applications. Moreover, Federal, Tribal, State, and local environmental, regulatory, and resource agencies are able to share data on particular resources, which can play a critical role in determining the feasibility of a transportation solution with respect to environmental impacts. The use of other agency planning outputs can result in a transportation project that could support multiple goals (transportation, environmental, and community). Further, planning decisions by these other agencies may have impacts on long-range transportation plans and/or the STIP/TIP, thereby providing important input to the transportation planning process and advancing integrated decision-making.

4. What is the procedure for using decisions or analyses from the transportation planning process?

The lead agencies jointly decide, and must agree, on what processes and consultation techniques are used to determine the transportation planning products that will be incorporated into the NEPA process. At a minimum, a robust scoping/early coordination process (which explains to Federal and State environmental, regulatory, and resource agencies and the public the information and/or analyses utilized to develop the planning products, how the purpose and need was developed and refined, and how the design concept and scope were determined) should play a critical role in leading to informed decisions by the lead agencies on the suitability of the transportation planning information, analyses, documents, and decisions for use in the NEPA process. As part of a rigorous scoping/early coordination process, the FHWA and the FTA should ensure that the transportation planning results are appropriately documented, shared, and used.

5. To what extent can the FHWA/FTA provide up-front assurance that decisions and additional investments made in the transportation planning process will allow planning-level decisions and analyses to be used in the NEPA process? [*7282]

There are no guarantees. However, the potential is greatly improved for transportation planning processes that address the "3-C" planning principles (comprehensive, cooperative, and continuous); incorporate the intent of NEPA through the consideration of natural, physical, and social effects; involve environmental, regulatory, and resource agencies; thoroughly document the transportation planning process information, analysis, and decision; and vet the planning results through the applicable public involvement processes.

6. What considerations will the FHWA/FTA take into account in their review of transportation planning products for acceptance in project development/NEPA?

The FHWA and the FTA will give deference to decisions resulting from the transportation planning process if the FHWA and FTA determine that the planning process is consistent with the "3-C" planning principles and when the planning study process, alternatives considered, and resulting decisions have a rational basis that is thoroughly documented and vetted through the applicable public involvement processes. Moreover, any applicable program-specific requirements (e.g., those of the Congestion Mitigation and Air Quality Improvement Program or the FTA's Capital Investment Grant program) also must be met.

The NEPA requires that the FHWA and the FTA be able to stand behind the overall soundness and credibility of analyses conducted and decisions made during the transportation planning process if they are incorporated into a NEPA document. For example, if systems-level or other broad objectives or choices from the transportation plan are incorporated into the purpose and need statement for a NEPA document, the FHWA and the FTA should not revisit whether these are the best objectives or choices among other options. Rather, the FHWA and the FTA review would include making sure that objectives or choices derived from the transportation plan were: Based on transportation planning factors established by Federal law; reflect a credible and articulated planning rationale; founded on reliable data; and developed through transportation planning processes meeting FHWA and FTA statutory and regulatory requirements. In addition, the basis for the goals and choices must be documented and included in the NEPA document. The FHWA/FTA reviewers do not need to review whether assumptions or analytical methods used in the studies are the best available, but, instead, need to assure that such assumptions or analytical methods are reasonable, scientifically acceptable, and consistent with goals, objectives, and policies set forth in long-range transportation plans. This review would include determining whether: (a) Assumptions have a rational basis and are up-to-date and (b) data, analytical methods, and modeling techniques are reliable, defensible, reasonably current, and meet data quality requirements.

II. Substantive Issues

General Issues To Be Considered:

7. What should be considered in order to rely upon transportation planning studies in NEPA?

The following questions should be answered prior to accepting studies conducted during the transportation planning process for use in NEPA. While not a "checklist," these questions are intended to guide the practitioner's analysis of the planning products:

. How much time has passed since the planning studies and corresponding decisions were made?

. Were the future year policy assumptions used in the transportation planning process related to land use, economic development, transportation costs, and network expansion consistent with those to be used in the NEPA process?

. Is the information still relevant/valid?

. What changes have occurred in the area since the study was completed?

. Is the information in a format that can be appended to an environmental document or reformatted to do so?

. Are the analyses in a planning-level report or document based on data, analytical methods, and modeling techniques that are reliable, defensible, and consistent with those used in other regional transportation studies and project development activities?

. Were the FHWA and FTA, other agencies, and the public involved in the relevant planning analysis and the corresponding planning decisions?

. Were the planning products available to other agencies and the public during NEPA scoping?

. During NEPA scoping, was a clear connection between the decisions made in planning and those to be made during the project development stage explained to the public and others? What was the response?

. Are natural resource and land use plans being informed by transportation planning products, and vice versa?

Purpose and Need:

8. How can transportation planning be used to shape a project's purpose and need in the NEPA process?

A sound transportation planning process is the primary source of the project purpose and need. Through transportation planning, State and local governments, with involvement of stakeholders and the public, establish a vision for the region's future transportation system, define transportation goals and objectives for realizing that vision, decide which needs to address, and determine the timeframe for addressing these issues. The transportation planning process also provides a potential forum to define a project's purpose and need by framing the scope of the problem to be addressed by a proposed project. This scope may be further refined during the transportation planning process as more information about the transportation need is collected and consultation with the public and other stakeholders clarifies other issues and goals for the region.

23 U.S.C. 139(f), as amended by the SAFETEA-LU Section 6002, provides additional focus regarding the definition of the purpose and need and objectives. For example, the lead agency, as early as practicable during the environmental review process, shall provide an opportunity for involvement by participating agencies and the public in defining the purpose and need for a project. The statement of purpose and need shall include a clear statement of the objectives that the proposed action is intended to achieve, which may include: (a) Achieving a transportation objective identified in an applicable statewide or metropolitan transportation plan; (b) supporting land use, economic development, or growth objectives established in applicable Federal, State, local, or Tribal plans; and (c) serving national defense, national security, or other national objectives, as established in Federal laws, plans, or policies.

The transportation planning process can be utilized to develop the purpose and need in the following ways:

(a) Goals and objectives from the transportation planning process may be part of the project's purpose and need statement;

(b) A general travel corridor or general mode or modes (e.g., highway, transit, or a highway/transit combination) resulting from planning analyses may be part of the project's purpose and need statement;

(c) If the financial plan for a metropolitan transportation plan indicates that funding for a specific project will require special funding sources (e.g., tolls or public-private financing), such information may be included in the purpose and need statement; or

(d) The results of analyses from management systems (e.g., congestion, pavement, bridge, and/or safety) may shape the purpose and need statement.

The use of these planning-level goals and choices must be appropriately explained during NEPA scoping and in the NEPA document.

Consistent with NEPA, the purpose and need statement should be a statement of a transportation problem, not a specific solution. However, the purpose and need statement should be specific enough to generate alternatives that may potentially yield real solutions to the problem at-hand. A purpose and need statement that yields only one alternative may indicate a purpose and need that is too narrowly defined.

Short of a fully integrated transportation decisionmaking process, many State DOTs develop information for their purpose and need statements when implementing interagency NEPA/Section 404 process merger agreements. These agreements may need to be expanded to include commitments to share and utilize transportation planning products when developing a project's purpose and need.

9. Under what conditions can the NEPA process be initiated in conjunction with transportation planning studies?

The NEPA process may be initiated in conjunction with transportation planning studies in a number of ways. A common method is the "tiered EIS," in which the first-tier EIS evaluates general travel corridors, modes, and/or packages of projects at a planning level of detail, leading to the refinement of purpose and need and, ideally, selection of the design concept and scope for a project or series of projects. Subsequently, second-tier NEPA review(s) of the resulting [*7283] projects would be performed in the usual way. The first-tier EIS uses the NEPA process as a tool to involve

environmental, regulatory, and resource agencies and the public in the planning decisions, as well as to ensure the appropriate consideration of environmental factors in these planning decisions.

Corridor or subarea analyses/studies are another option when the long-range transportation plan leaves open the possibility of multiple approaches to fulfill its goals and objectives. In such cases, the formal NEPA process could be initiated through publication of a NOI in conjunction with a corridor or subarea planning study. Similarly, some public transportation operators developing major capital projects perform the mandatory planning Alternatives Analysis required for funding under FTA's Capital Investment Grant program [*49 U.S.C. 5309(d)* and (e)] within the NEPA process and combine the planning Alternatives Analysis with the draft EIS.

Alternatives:

10. In the context of this Appendix, what is the meaning of the term "alternatives"?

This Appendix uses the term "alternatives" as specified in the NEPA regulations (*40 CFR 1502.14*), where it is defined in its broadest sense to include everything from major modal alternatives and location alternatives to minor design changes that would mitigate adverse impacts. This Appendix does not use the term as it is used in many other contexts (e.g., "prudent and feasible alternatives" under Section 4(f) of the Department of Transportation Act, the "Least Environmentally Damaging Practicable Alternative" under the Clean Water Act, or the planning Alternatives Analysis in *49 U.S.C. 5309(d)* and (e)).

11. Under what circumstances can alternatives be eliminated from detailed consideration during the NEPA process based on information and analysis from the transportation planning process?

There are two ways in which the transportation planning process can begin limiting the alternative solutions to be evaluated during the NEPA process: (a) Shaping the purpose and need for the project; or (b) evaluating alternatives during planning studies and eliminating some of the alternatives from detailed study in the NEPA process prior to its start. Each approach requires careful attention, and is summarized below.

(a) *Shaping the Purpose and Need for the Project:* The transportation planning process should shape the purpose and need and, thereby, the range of reasonable alternatives. With proper documentation and public involvement, a purpose and need derived from the planning process can legitimately narrow the alternatives analyzed in the NEPA process. See the response to Question 8 for further discussion on how the planning process can shape the purpose and need used in the NEPA process.

For example, the purpose and need may be shaped by the transportation planning process in a manner that consequently narrows the range of alternatives that must be considered in detail in the NEPA document when:

(1) The transportation planning process has selected a *general travel corridor* as best addressing identified transportation problems and the rationale for the determination in the planning document is reflected in the purpose and need statement of the subsequent NEPA document;

(2) The transportation planning process has selected a *general mode* (e.g., highway, transit, or a highway/transit combination) that accomplishes its goals and objectives, and these documented determinations are reflected in the purpose and need statement of the subsequent NEPA document; or

(3) The transportation planning process determines that the project needs to be funded by *tolls or other non-traditional funding sources* in order for the long-range transportation plan to be fiscally constrained or identifies goals and objectives that can only be met by toll roads or other non-traditional funding sources, and that determination of those goals and objectives is reflected in the purpose and need statement of the subsequent NEPA document.

(b) *Evaluating and Eliminating Alternatives During the Transportation Planning Process:* The evaluation and elimination of alternatives during the transportation planning process can be incorporated by reference into a NEPA document under certain circumstances. In these cases, the planning study becomes part of the NEPA process and provides a basis for screening out alternatives. As with any part of the NEPA process, the analysis of alternatives to be incorporated from the process must have a rational basis that has been thoroughly documented (including documentation of the necessary and appropriate vetting through the applicable public involvement processes). This record should be made available for public review during the NEPA scoping process.

See responses to Questions 4, 5, 6, and 7 for additional elements to consider with respect to acceptance of planning products for NEPA documentation and the response to Question 12 on the information or analysis from the transporta-

tion planning process necessary for supporting the elimination of an alternative(s) from detailed consideration in the NEPA process.

For instance, under FTA's Capital Investment Grant program, the alternatives considered in the NEPA process may be narrowed in those instances that the planning Alternatives Analysis required by *49 U.S.C. 5309(e)* is conducted as a planning study prior to the NEPA review. In fact, the FTA may be able to narrow the alternatives considered in detail in the NEPA document to the No-Build (No Action) alternative and the Locally Preferred Alternative. Alternatives must meet the following criteria if they are deemed sufficiently considered by a planning Alternatives Analysis under FTA's Capital Investment Grant program conducted prior to NEPA without a programmatic NEPA analysis and documentation:

. During the planning Alternatives Analysis, all of the reasonable alternatives under consideration must be fully evaluated in terms of their transportation impacts; capital and operating costs; social, economic, and environmental impacts; and technical considerations;

. There must be appropriate public involvement in the planning Alternatives Analysis;

. The appropriate Federal, State, and local environmental, regulatory, and resource agencies must be engaged in the planning Alternatives Analysis;

. The results of the planning Alternatives Analysis must be documented;

. The NEPA scoping participants must agree on the alternatives that will be considered in the NEPA review; and

. The subsequent NEPA document must include the evaluation of alternatives from the planning Alternatives Analysis.

The above criteria apply specifically to FTA's Capital Investment Grant process. However, for other transportation projects, if the planning process has included the analysis and stakeholder involvement that would be undertaken in a first tier NEPA process, then the alternatives screening conducted in the transportation planning process may be incorporated by reference, described, and relied upon in the project-level NEPA document. At that point, the project-level NEPA analysis can focus on the remaining alternatives.

12. What information or analysis from the transportation planning process is needed in an EA or EIS to support the elimination of an alternative(s) from detailed consideration?

The section of the EA or EIS that discusses alternatives considered but eliminated from detailed consideration should:

(a) Identify any alternatives eliminated during the transportation planning process (this could include broad categories of alternatives, as when a long-range transportation plan selects a general travel corridor based on a corridor study, thereby eliminating all alternatives along other alignments);

(b) Briefly summarize the reasons for eliminating the alternative; and

(c) Include a summary of the analysis process that supports the elimination of alternatives (the summary should reference the relevant sections or pages of the analysis or study) and incorporate it by reference or append it to the NEPA document.

Any analyses or studies used to eliminate alternatives from detailed consideration should be made available to the public and participating agencies during the NEPA scoping process and should be reasonably available during comment periods.

Alternatives passed over during the transportation planning process because they are infeasible or do not meet the NEPA "purpose and need" can be omitted from the detailed analysis of alternatives in the NEPA document, as long as the rationale for elimination is explained in the NEPA document. Alternatives that remain "reasonable" after the planning-level analysis must be addressed in the EIS, even when they are not the preferred alternative. When the proposed action evaluated in an EA involves unresolved conflicts concerning alternative uses of available resources, NEPA requires that appropriate alternatives be studied, developed, and described.

Affected Environment and Environmental Consequences: [*7284]

13. What types of planning products provide analysis of the affected environment and environmental consequences that are useful in a project-level NEPA analysis and document?

The following planning products are valuable inputs to the discussion of the affected environment and environmental consequences (both its current state and future state in the absence of the proposed action) in the project-level NEPA analysis and document:

. Regional development and growth analyses;

. Local land use, growth management, or development plans; and

. Population and employment projections.

The following are types of information, analysis, and other products from the transportation planning process that can be used in the discussion of the affected environment and environmental consequences in an EA or EIS:

(a) Geographic information system (GIS) overlays showing the past, current, or predicted future conditions of the natural and built environments;

(b) Environmental scans that identify environmental resources and environmentally sensitive areas;

(c) Descriptions of airsheds and watersheds;

(d) Demographic trends and forecasts;

(e) Projections of future land use, natural resource conservation areas, and development; and

(f) The outputs of natural resource planning efforts, such as wildlife conservation plans, watershed plans, special area management plans, and multiple species habitat conservation plans.

However, in most cases, the assessment of the affected environment and environmental consequences conducted during the transportation planning process will not be detailed or current enough to meet NEPA standards and, thus, the inventory and evaluation of affected resources and the analysis of consequences of the alternatives will need to be supplemented with more refined analysis and possibly site-specific details during the NEPA process.

14. What information from the transportation planning process is useful in describing a baseline for the NEPA analysis of indirect and cumulative impacts?

Because the nature of the transportation planning process is to look broadly at future land use, development, population increases, and other growth factors, the planning analysis can provide the basis for the assessment of indirect and cumulative impacts required under NEPA. The consideration in the transportation planning process of development, growth, and consistency with local land use, growth management, or development plans, as well as population and employment projections, provides an overview of the multitude of factors in an area that are creating pressures not only on the transportation system, but on the natural ecosystem and important environmental and community resources. An analysis of all reasonably foreseeable actions in the area also should be a part of the transportation planning process. This planning-level information should be captured and utilized in the analysis of indirect and cumulative impacts during the NEPA process.

To be used in the analysis of indirect and cumulative impacts, such information should:

(a) Be sufficiently detailed that differences in consequences of alternatives can be readily identified;

(b) Be based on current data (e.g., data from the most recent Census) or be updated by additional information;

(c) Be based on reasonable assumptions that are clearly stated; and/or

(d) Rely on analytical methods and modeling techniques that are reliable, defensible, and reasonably current.

Environmental Mitigation:

15. How can planning-level efforts best support advance mitigation, mitigation banking, and priorities for environmental mitigation investments?

A lesson learned from efforts to establish mitigation banks and advance mitigation agreements and alternative mitigation options is the importance of beginning interagency discussions during the transportation planning process. Development pressures, habitat alteration, complicated real estate transactions, and competition for potential mitigation

sites by public and private project proponents can encumber the already difficult task of mitigating for "like" value and function and reinforce the need to examine mitigation strategies as early as possible.

Robust use of remote sensing, GIS, and decision support systems for evaluating conservation strategies are all contributing to the advancement of natural resource and environmental planning. The outputs from environmental planning can now better inform transportation planning processes, including the development of mitigation strategies, so that transportation and conservation goals can be optimally met. For example, long-range transportation plans can be screened to assess the effect of general travel corridors or density, on the viability of sensitive plant and animal species or habitats. This type of screening provides a basis for early collaboration among transportation and environmental staffs, the public, and regulatory agencies to explore areas where impacts must be avoided and identify areas for mitigation investments. This can lead to mitigation strategies that are both more economical and more effective from an environmental stewardship perspective than traditional project-specific mitigation measures.

III. Administrative Issues:

16. Are Federal funds eligible to pay for these additional, or more in depth, environmental studies in transportation planning?

Yes. For example, the following FHWA and FTA funds may be utilized for conducting environmental studies and analyses within transportation planning:

. FHWA planning and research funds, as defined under 23 CFR Part 420 (e.g., Metropolitan Planning (PL), Statewide Planning and Research (SPR), National Highway System (NHS), Surface Transportation Program (STP), and Equity Bonus); and

. FTA planning and research funds (*49 U.S.C. 5303* and *49 U.S.C. 5313(b)*), urban formula funds (*49 U.S.C. 5307*), and (in limited circumstances) transit capital investment funds (*49 U.S.C. 5309*).

The eligible transportation planning-related uses of these funds may include: (a) Conducting feasibility or subarea/corridor needs studies and (b) developing system-wide environmental information/inventories (e.g., wetland banking inventories or standards to identify historically significant sites). Particularly in the case of PL and SPR funds, the proposed expenditure must be closely related to the development of transportation plans and programs under *23 U.S.C. 134*-135 and *49 U.S.C. 5303-5306*.

For FHWA funding programs, once a general travel corridor or specific project has progressed to a point in the preliminary engineering/NEPA phase that clearly extends beyond transportation planning, additional in-depth environmental studies must be funded through the program category for which the ultimate project qualifies (e.g., NHS, STP, Interstate Maintenance, and/or Bridge), rather than PL or SPR funds.

Another source of funding is FHWA's Transportation Enhancement program, which may be used for activities such as: conducting archeological planning and research; developing inventories such as those for historic bridges and highways, and other surface transportation-related structures; conducting studies to determine the extent of water pollution due to highway runoff; and conducting studies to reduce vehicle-caused wildlife mortality while maintaining habitat connectivity.

The FHWA and the FTA encourage State DOTs, MPOs, and public transportation operators to seek partners for some of these studies from environmental, regulatory, and resource agencies, non-government organizations, and other government and private sector entities with similar data needs, or environmental interests. In some cases, these partners may contribute data and expertise to the studies, as well as funding.

17. What staffing or organizational arrangements may be helpful in allowing planning products to be accepted in the NEPA process?

Certain organizational and staffing arrangements may support a more integrated approach to the planning/NEPA decision-making continuum. In many cases, planning organizations do not have environmental expertise on staff or readily accessible. Likewise, the review and regulatory responsibilities of many environmental, regulatory, and resource agencies make involvement in the transportation planning process a challenge for staff resources. These challenges may be partially met by improved use of the outputs of each agency's planning resources and by augmenting their capabilities through greater use of GIS and remote sensing technologies (see *http://www.gis.fhwa.dot.gov/* for additional information on the use of GIS). Sharing databases and the planning products of local land use decision-makers and State and

Federal environmental, regulatory, and [*7285] resource agencies also provide efficiencies in acquiring and sharing the data and information needed for both transportation planning and NEPA work.

Additional opportunities such as shared staff, training across disciplines, and (in some cases) reorganizing to eliminate structural divisions between planning and NEPA practitioners may also need to be considered in order to better integrate NEPA considerations into transportation planning studies. The answers to the following two questions also contain useful information on training and staffing opportunities.

18. How have environmental, regulatory, and resource agency liaisons (Federally- and State DOT-funded positions) and partnership agreements been used to provide the expertise and interagency participation needed to enhance the consideration of environmental factors in the planning process?

For several years, States have utilized Federal and State transportation funds to support focused and accelerated project review by a variety of local, State, Tribal, and Federal agencies. While Section 1309(e) of the TEA-21 and its successor in SAFETEA-LU section 6002 speak specifically to transportation project streamlining, there are other authorities that have been used to fund positions, such as the Intergovernmental Cooperation Act (*31 U.S.C. 6505*). In addition, long-term, on-call consultant contracts can provide backfill support for staff that are detailed to other parts of an agency for temporary assignments. At last count (as of 2003), 246 positions were being funded. Additional information on interagency funding agreements is available at: *http://environment.fhwa.dot.gov/strmlng/igdocs/index.htm*.

Moreover, every State has advanced a variety of stewardship and streamlining initiatives that necessitate early involvement of environmental, regulatory, and resource agencies in the project development process. Such process improvements have: addressed the exchange of data to support avoidance and impact analysis; established formal and informal consultation and review schedules; advanced mitigation strategies; and resulted in a variety of programmatic reviews. Interagency agreements and workplans have evolved to describe performance objectives, as well as specific roles and responsibilities related to new streamlining initiatives. Some States have improved collaboration and efficiency by co-locating environmental, regulatory, and resource and transportation agency staff.

19. What training opportunities are available to MPOs, State DOTs, public transportation operators and environmental, regulatory, and resource agencies to assist in their understanding of the transportation planning and NEPA processes?

Both the FHWA and the FTA offer a variety of transportation planning, public involvement, and NEPA courses through the National Highway Institute and/or the National Transit Institute. Of particular note is the Linking Planning and NEPA Workshop, which provides a forum and facilitated group discussion among and between State DOT; MPO; Federal, Tribal, and State environmental, regulatory, and resource agencies; and FHWA/FTA representatives (at both the executive and program manager levels) to develop a State-specific action plan that will provide for strengthened linkages between the transportation planning and NEPA processes.

Moreover, the U.S. Fish and Wildlife Service offers Green Infrastructure Workshops that are focused on integrating planning for natural resources ("green infrastructure") with the development, economic, and other infrastructure needs of society ("gray infrastructure").

Robust planning and multi-issue environmental screening requires input from a wide variety of disciplines, including information technology; transportation planning; the NEPA process; and regulatory, permitting, and environmental specialty areas (e.g., noise, air quality, and biology). Senior managers at transportation and partner agencies can arrange a variety of individual training programs to support learning curves and skill development that contribute to a strengthened link of the transportation planning and NEPA processes. Formal and informal mentoring on an intra-agency basis can be arranged. Employee exchanges within and between agencies can be periodically scheduled, and persons involved with professional leadership programs can seek temporary assignments with partner agencies.

IV. Additional Information on this Topic

Valuable sources of information are FHWA's environment website (*http://www.fhwa.dot.gov/environment/index.htm*) and FTA's environmental streamlining website (*http://www.environment.fta.dot.gov*). Another source of information and case studies is NCHRP Report 8-38 (Consideration of Environmental Factors in Transportation Systems Planning), which is available at *http://www4.trb.org/trb/crp.nsf/All+Projects/NCHRP+8-38*. In addition, AASHTO's Center for Environmental Excellence website is continuously updated with news and links to information of interest to transportation and environmental professionals (*www.transportation.environment.org*).

PART 500--MANAGEMENT AND MONITORING SYSTEMS

2. Revise the authority citation for part 500 to read as follows:

Authority: *23 U.S.C. 134*, *135*, *303*, and *315*; *49 U.S.C. 5303-5305*; *23 CFR 1.32*; and *49 CFR 1.48* and *1.51*.

3. Revise § 500.109 to read as follows:

§ 500.109 CMS.

(a) For purposes of this part, congestion means the level at which transportation system performance is unacceptable due to excessive travel times and delays. Congestion management means the application of strategies to improve system performance and reliability by reducing the adverse impacts of congestion on the movement of people and goods in a region. A congestion management system or process is a systematic and regionally accepted approach for managing congestion that provides accurate, up-to-date information on transportation system operations and performance and assesses alternative strategies for congestion management that meet State and local needs.

(b) The development of a congestion management system or process should result in performance measures and strategies that can be integrated into transportation plans and programs. The level of system performance deemed acceptable by State and local officials may vary by type of transportation facility, geographic location (metropolitan area or subarea and/or non-metropolitan area), and/or time of day. In both metropolitan and non-metropolitan areas, consideration needs to be given to strategies that manage demand, reduce single occupant vehicle (SOV) travel, and improve transportation system management and operations. Where the addition of general purpose lanes is determined to be an appropriate congestion management strategy, explicit consideration is to be given to the incorporation of appropriate features into the SOV project to facilitate future demand management strategies and operational improvements that will maintain the functional integrity of those lanes.

Title 49--Transportation

4. The authority citation for part 613 continues to read as follows:

Authority: *23 U.S.C. 134*, *135*, and *217(g)*; *42 U.S.C. 3334*, 4233, *4332*, *7410* et seq; *49 U.S.C. 5303-5306*, *5323(k)*; and *49 CFR 1.48(b)*, *1.51(f)* and *21.7(a)*.

5. Revise Subpart A and Subpart B of 49 CFR part 613 to read as follows:

Part 613--METROPOLITAN AND STATEWIDE PLANNING

Subpart A--Metropolitan Transportation Planning and Programming

Sec.

613.100 Metropolitan transportation planning and programming.

Subpart B--Statewide Transportation Planning and Programming

Sec.

613.200 Statewide transportation planning and programming. [*7286]

Subpart A--Metropolitan Transportation Planning and Programming

§ 613.100 Metropolitan transportation planning and programming.

The regulations in 23 CFR 450, subpart C, shall be followed in complying with the requirements of this subpart. The definitions in 23 CFR 450, subpart A, shall apply.

Subpart B--Statewide Transportation Planning and Programming

§ 613.200 Statewide transportation planning and programming.

The regulations in 23 CFR 450, subpart B, shall be followed in complying with the requirements of this subpart. The definitions in 23 CFR 450, subpart A, shall apply.

[FR Doc. 07-493 Filed 2-13-07 8:45 am]

BILLING CODE 4910-22-P

FEDERAL REGISTER

Vol. 73, No. 226

Notices

ENVIRONMENTAL PROTECTION AGENCY (EPA)

[ER-FRL-8587-7]

Environmental Impact Statements; Notice of Availability

73 FR 70639

DATE: Friday, November 21, 2008

Responsible Agency: Office of Federal Activities, General Information (202) 564-1399 or *http://www.epa.gov/compliance/nepa/.*

Weekly receipt of Environmental Impact Statements

Filed 11/10/2008 Through 11/14/2008

Pursuant to *40 CFR 1506.9.*

EIS No. 20080464, Draft Supplement, AFS, MN, Echo Trail Area Forest Management Project, Updated Information to Further Address Water Quality and Watershed Health, Superior National Forest, Lacroix Ranger District and Kawishiwi Ranger District, St. Louis and Lake Counties, MN, Comment Period Ends: 01/05/2009, Contact: Carol Booth, 218-666-0020.

EIS No. 20080465, Final EIS, AFS, WY, Battle Park Cattle and Horse (C&H) and Mistymoon Sheep and Goat (S&G) Allotment Project, Proposes to Continue Livestock Grazing on both Allotments, Powder River District Ranger, Bighorn National Forest, Bighorn County, WY, Wait Period Ends: 12/22/2008, Contact: Mark Booth 307-684-7806.

EIS No. 20080466, Final EIS, USN, 00, Introduction of the P-8A MMA into the U.S. Navy Fleet, To Provide Facilities and Functions that Support the Homebasing of 12 P-8A Multi-Mission Maritime Aircraft (MMA) Fleet Squardrons (72 Aircraft) and one Fleet Replacement Squadron (FRS), which include the Following Installations: Naval Air Station Jacksonville, FL; Naval Air Station Whidbey Island, WA; Naval Air Station North Island, CA; Marine Corps Base, HI and Kaneohe Bay, HI, Wait Period Ends: 12/22/2008, [*70640] Contact: Chris Harding, 757-322-4741.

EIS No. 20080467, Final EIS, AFS, WA, The Summit at Snoqualmie Master Development Plan (MPD), Proposal to Ensure Long-Term Economic Viability, Mt. Baker-Snoqualmie/Okanogan-Wenatchee National Forests, King and Kittitas Counties, WA, Wait Period Ends: 12/22/2008, Contact: Curtis Spalding, 425-783-6033.

EIS No. 20080468, Revised Draft EIS, BLM, NV, Emigrant Mine Project, Proposed Open Pit Gold Mine, Plan-of-Operation, South of Carlin in Elko County, NV, Comment Period Ends: 01/07/2009, Contact: Tom Schmidt 775-753-0200.

EIS No. 20080469, Draft EIS, FHW, HI, Honolulu High-Capacity Transit Corridor Project, Provide High-Capacity Transit Service on O'ahu from Kapolei to the University of Hawaii at Manoa and Waikiki, City and County of Honolulu, O'ahu, Hawaii, Comment Period Ends: 01/07/2009, Contact: Ted Matley, 415-744-3133.

EIS No. 20080470, Final EIS, FHW, VT, Middlebury Spur Project, Improvements to the Freight Transportation System in the Town of Middlebury in Addison County to the Town of Pittsford in Rutland County, VT, Wait Period Ends: 12/23/2008, Contact: Kenneth Sikora, Jr., 802-828-4573.

EIS No. 20080471, Final EIS, AFS, SD, South Project Area, Proposes Multiple Resource Management Actions, Selected Alternative 3, Hell Canyon Ranger District, Black Hills National Forest, Custer County, SD, Wait Period Ends: 12/22/2008, Contact: Betsy Koncerak 605-673-4853.

EIS No. 20080472, Final EIS, FRC, PA, Holtwood Hydroelectric Project (Docket No. P-1881-050) Application for an Amendment License to Increase the Installed Capacity, Susquehanna River, Lancaster and York Counties, PA, Wait Period Ends: 12/22/2008, Contact: Blake Condo, 202-502-8914.

EIS No. 20080473, Final EIS, USN, FL, Mayport Naval Station Project, Proposed Homeporting of Additional Surface Ships, Several Permits, Mayport, FL, Wait Period Ends: 12/22/2008, Contact: Royce Kemp, 904-542-6899.

Amended Notices

EIS No. 20080353, Draft Supplement, AFS, 00, Gypsy Moth Management in the United States: A Cooperative Approach, Proposing New Treatments that were not Available when the 1995 EIS was written, US, Comment Period Ends: 12/18/2008, Contact: William Oldland, 304-285-1585. Revision to FR Notice Published 09/19/2008: Extending Comment Period from 11/17/2008 to 12/18/2008.

EIS No. 20080396, Draft EIS, AFS, MT, Ashland Ranger District Travel Management Project, Proposing to Designate Routes for Public Motorized Use, Ashland Ranger District, Custer National Forest, Rosebud and Power River Counties, MT, Comment Period Ends: 12/02/2008, Contact: Doug Epperly, 406-657-6205 Ext. 225. Revision to FR Notice Published 10/03/2008: Extending Comment Period from 11/17/2008 to 12/02/2008.

Dated: November 18, 2008.

Robert W. Hargrove,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. E8-27729 Filed 11-20-08; 8:45 am]

BILLING CODE 6560-50-P

FEDERAL REGISTER

Vol. 73, No. 245

Notices

ENVIRONMENTAL PROTECTION AGENCY (EPA)

[ER-FRL-8588-6]

Environmental Impacts Statements; Notice of Availability

73 FR 77687

DATE: Friday, December 19, 2008

Responsible Agency: Office of Federal Activities, General Information (202) 564-1399 or *http://www.epa.gov/compliance/neap/.* Weekly receipt of Environmental Impact Statements Filed 12/08/2008 Through 12/12/2008. Pursuant to *40 CFR 1506.9*.

EIS No. 20080513, Draft EIS, AFS, AK, Central Kupreanof Timber Harvest Project, Proposes To Harvest up to 70.2 Million Board Feet of Timber, Kupreanof Island, Petersburg Ranger District, Tongass National Forest, AK, Comment Period Ends: 02/02/2009, Contact: Tiffany Benna 907-772-3871.

EIS No. 20080514, Final EIS, AFS, ID, Corralled Bear Project, Management of Vegetation, Hazardous Fuels, and Access, Plus Watershed Improvements, Palouse Ranger District, Clearwater National Forest, Latah County, ID, Wait Period Ends: 01/20/2009, Contact: Kara Chadwick 208-875-1131.

EIS No. 20080515, Final EIS, BLM, WY, West Antelope Coal Lease Application (Federal Coal Lease Application WYW163340), Implementation, Converse and Campbell Counties, WY, Wait Period Ends: 01/20/2009, Contact: Sarah Bucklin 307-261-7541.

EIS No. 20080516, Draft EIS, NPS, AK, LEGISLATIVE--Glacier Bay National Park Project, Authorize Harvest of Glaucous-Winged Gull Eggs by the Huna Tlingit, Implementation, AK, Comment Period Ends: 03/06/2009, Contact: Mary Beth Moss 907-317-1270.

EIS No. 20080517, Final EIS, FHW, NY, Kosciuszko Bridge Project, Propose Rehabilitation or Replacement a 1.1 mile Segment Brooklyn-Queens Expressway (-278) from Morgan Avenue in Brooklyn and the Long Island Expressway (1495) in Queens, Kings and Queens Counties, NY, Wait Period Ends: 01/23/2009, Contact: Jeffrey Kolb 518-431-4125.

EIS No. 20080518, Draft EIS, BLM, NV, Bald Mountain Mine Norther Operations Area Project, Proposes To Expand Current Mining Operations at Several Existing Pits, Rock Disposal Areas, Heap Leach Pads, Processing Facilities, and Interpit Area, Combining the Bald Mountain Mine Plan of Operations Boundary and the Mooney Basin Operation Area Boundary, White Pine County, NV, Comment Period Ends: 02/02/2009, Contact: Lynn Bjorklund 775-289-1893.

EIS No. 20080519, Draft EIS, NPS, PA, White-tailed Deer Management Plan, Develop a Deer Management Strategy That Supports Protection, Preservation and Restoration of Native Vegetation, Implementation, Valley Forge National Historical Park, King of Prussia, PA, Comment Period Ends: 02/17/2009, Contact: Kristina M. Heister 610-783-1008.

EIS No. 20080520, Draft EIS, CGD, 00, USCG Pacific Operations: Districts 11 Area, California and Districts 13 Area, Oregon and Washington, Improve the Protection and Conservation of Marine Protected Species and Marine Protected Areas, CA, OR and WA, Comment Period Ends: 02/17/2009, Contact: Lt. Jeff Bray 202-372-3752.

EIS No. 20080521, Draft EIS, NPS, ND, Theodore Roosevelt National Park, Elk Management Plan, Implementation, Billing and McKenzie Counties, ND, Comment Period Ends: 03/19/2009, Contact: Valerie Naylor 701-623-4466.

EIS No. 20080522, Final EIS, NRC, GA, GENERIC--License Renewal of Nuclear Plants, Supplement 34 to NUREG-1437, Regarding Vogtle Electric Generating Plant Units 1 and 2 (VEGP) near Waynesboro, GA, Comment Period Ends: 01/20/2009, Contact: Samuel Hernandez 301-415-4049.

EIS No. 20080523, Draft EIS, BLM, 00, UNEV Pipeline Project, Construction of a 399-Mile Long Main Petroleum Products Pipeline, Salt Lake, Tooele, Juab, Millard, Iron, and Washington Counties, UT, and Clark County, NV, Comment Period Ends: 02/02/2009, Contact: Joe Incardine 801-524-3833.

EIS No. 20080524, Draft EIS, STB, AK, Northern Rail Extension Project, Construct and Operate a Rail Line Between Norther Pole, AK, and Delta Junction, AK, Comment Period Ends: 02/02/2009, Contact: Dave Navecky 202-245-0294.

EIS No. 20080525, Final EIS, FHW, NJ, I-295/I-76/Route 42 Direct Connection Project, To Improve Traffic Safety and Reduce Traffic Congestion, Funding and U.S. Army COE Section 10 and 404 Permits, Borough of Bellmawr, Borough of [*77688] Mount Ephraim and Gloucester City, Camden County, NJ, Wait Period Ends: 01/20/2009, Contact: Matthew Zeller 609-637-4200.

EIS No. 20080526, Final EIS, IBR, CO, Southern Delivery System Project, Water Supply Development, Execution of up to 40-year Contracts for Use of Fryingpan-Arkansas Project Facilities, Special Use Permit, El Paso County, CO, Wait Period Ends: 01/20/2009, Contact: Kara Lamb 970-663-3212.

Amended Notices

EIS No. 20080418, Draft EIS, DOE, 00, PROGRAMMATIC--Global Nuclear Energy Partnership (GNEP) Program, To Support a Safe, Secure, and Sustainable Expansion of Nuclear Energy, Both Domestically and Internationally, (DOE/EIS-0396), Comment Period Ends: 03/16/2009, Contact: Francis G. Schwartz 866-645-7803.

Revision of FR Notice Published 10/17/2008: Extending Comment Period 12/16/2008 to 03/16/2009.

EIS No. 20080448, Draft EIS, NPS, AZ, Fire Management Plan, Management of Wildland and Prescribed Fire, Protection of Human Life and Property Restoration and Maintenance of Fire Dependent Ecosystems, and Reduction of Hazardous Fuels, Grand Canyon National Park, Coconino County, AZ, Comment Period Ends: 01/21/2009, Contact: Chris Marks 986-606-1050.

Revision to FR Notice Published: Extending Comment Period from12/22/2008 to 01/21/2009.

EIS No. 20080469, Draft EIS, FTA, HI, Honolulu High-Capacity Transit Corridor Project, Provide High-Capacity Transit Service on O'ahu From Kapolei to the University of Hawaii at Manoa and Waikiki, City and County of Honolulu, O'ahu, Hawaii, Comment Period Ends: 02/06/2009, Contact: Ted Matley 415-744-3133.

Revision to FR Notice Published 11/21/2008: Extending Comment Period from 01/07/2009 to 02/06/2009.

Dated: December 16, 2008.

Robert W. Hargrove,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. E8-30208 Filed 12-18-08; 8:45 am]

BILLING CODE 6560-50-P

FEDERAL REGISTER

Vol. 74, No. 030

Proposed Rules

DEPARTMENT OF TRANSPORTATION (DOT)

Federal Transit Administration

49 CFR Part 611

[Docket No. FTA-2006-25737]

RIN 2132-AA81

Major Capital Investment Projects

74 FR 7388

DATE: Tuesday, February 17, 2009

ACTION: Notice of proposed rulemaking; withdrawal.

SUMMARY: This action withdraws a notice of proposed rulemaking (NPRM) concerning major capital investment projects published in the **Federal Register** on August 3, 2007 *(72 FR 43328).* FTA has determined that withdrawal of the NPRM is warranted due to an intervening statutory change.

FOR FURTHER INFORMATION CONTACT: Christopher Van Wyk, Office of Chief Counsel, Federal Transit Administration, 1200 New Jersey Ave., SE., East Building, Fifth Floor, Washington, DC 20590, (202) 366-4011 or *Christopher.VanWyk@dot.gov.*

SUPPLEMENTARY INFORMATION: On August 10, 2005, President Bush signed the Safe, Accountable, Flexible, and Efficient Transportation Equity Act--A Legacy for Users (SAFETEA-LU). Section 3011 of SAFETEA-LU made a number of changes to *49 U.S.C. 5309*, which authorizes the Federal Transit Administration's (FTA) capital investment grant program. SAFETEA-LU also required that FTA issue regulations establishing an evaluation and rating process for the new Small Starts program. To effectuate the statutory changes and comply with the rulemaking requirement, FTA published an advance notice of proposed rulemaking on January 30, 2006 and a notice of proposed rulemaking (NPRM) on August 3, 2007. On June 6, 2008, the SAFETEA-LU Technical Corrections Act of 2008 (122 Stat. 1572) was signed into law, amending *49 U.S.C. 5309* to require that FTA "give comparable, but not necessarily equal, numerical weight to each project justification criteria in calculating the overall project rating" for both New Start and Small Start projects. The revisions to the statute require such a fundamental change in how FTA weighs the several project justification criteria that a new approach to rulemaking for the New Starts and Small Starts program is required. Thus, FTA is publishing this notice to withdraw the NPRM it issued on August 3, 2007.

FTA received numerous written comments in response to the NPRM. The majority of commenters opposed the NPRM, with overwhelmingly negative comment on a number of specific proposals. The following concerns emerged as the most widely held: A regulatory requirement that a project be rated medium on cost-effectiveness in order to obtain a

funding recommendation; cost-effectiveness weighted fifty percent of the overall project justification rating; modification of the definition of "fixed guideway" to include High Occupancy Toll (HOT) lanes under certain conditions; consideration given to congestion reduction in evaluating projects; inclusion of weights for evaluation criteria in the regulatory text rather than in policy guidance; the level of simplification for the new Small Starts program; the combination of the evaluation measures for economic development and land use and the weight given to the combined measure; the prohibition on segmenting a New Starts project into several Small Starts projects; and the proposal for the Very Small Starts category of projects.

Today's issue of the **Federal Register** contains another withdrawal notice by which FTA is also withdrawing the NPRM it issued for the Contractor Performance Incentives for the Capital Investment Program on February 19, 2008 *(73 FR 9075).*

The Withdrawal

In consideration of the foregoing, the NPRM for FTA Docket No. FTA-2006-25737, as published in the **Federal Register** on August 3, 2007 *(72 FR 43328)* is hereby withdrawn.

Issued in Washington, DC, this 10th day of February, 2009.

Matthew J. Welbes,

Acting Deputy Administrator.

[FR Doc. E9-3208 Filed 2-13-09; 8:45 am]

BILLING CODE 4910-57-P

FEDERAL REGISTER

Vol. 75, No. 122

Notices

ENVIRONMENTAL PROTECTION AGENCY (EPA)

[ER-FRL-8991-1]

Environmental Impacts Statements; Notice of Availability

View PDF of Federal Register Print Version

75 FR 36386

DATE: Friday, June 25, 2010

Responsible Agency: Office of Federal Activities, General Information (202) 564-1399 or *http://www.epa.gov/compliance/nepa/.*

Weekly receipt of Environmental Impact Statements filed 06/14/2010 through 06/18/2010 pursuant to *40 CFR 1506.9.*

Notice: In accordance with Section 309(a) of the Clean Air Act, EPA is required to make its comments on EISs issued by other Federal agencies public. Historically, EPA has met this mandate by publishing weekly notices of availability of EPA comments, which includes a brief summary of EPA's comment letters, in the **Federal Register** . Since February 2008, EPA has been including its comment letters on EISs on its Web site at: *http://www.epa.gov/compliance/nepa/eisdata.html.* Including the entire EIS comment letters on the Web site satisfies the Section 309(a) requirement to make EPA's comments on EISs available to the public. Accordingly, on March 31, 2010, EPA discontinued the publication of the notice of availability of EPA comments in the **Federal Register** .

EIS No. 20100225, Draft EIS, BLM, NV, Winnemucca District Office Resource Management Plan, Implementation, Black Rock Desert-High Rock Canyon Emigrant Trails National Conservation Area, Humboldt, Pershing, Washoe, Lyon and Churchill Counties, NV, Comment Period Ends: 09/22/2010, Contact: Robert Edward, 775-623-1597.

EIS No. 20100226, Final EIS, USFS, CA, Big Grizzly Fuels Reduction and Forest Health Project, Proposes Vegetation Treatments, Eldorado National Forest, Georgetown Ranger District, Georgetown, CA, Wait Period Ends: 07/26/2010, Contact: Dana Walsh, 530-333-5558.

EIS No. 20100227, Final EIS, NOAA, 00, Rationalization of the Pacific Coast Groundfish Limited Entry Trawl Fishery, Amendment 20, Implementation, WA, OR and CA, Wait Period Ends: 07/26/2010, Contact: Barry A. Thom, 206-526-6150.

EIS No. 20100228, Final EIS, FHWA, WI, WI-23 Highway Project, Transportation Improve between Fond du Lac and Plymouth, Fond du Lac and Sheboygan Counties, WI, Wait Period Ends: 07/26/2010, Contact: George Poirier, 608-829-7500.

EIS No. 20100229, Draft EIS, NRC, NC, GE-Hitachi Global Laser Enrichment LLC Facility, Construct, Operate, and Decommission a Laser-Based Uranium Enrichment Facility, Wilmington, NC, Comment Period Ends: 08/09/2010, Contact: Jennifer Davis, 301-415-3835.

EIS No. 20100230, Final EIS, FTA, HI, Honolulu High-Capacity Transit Corridor Project, Provide High-Capacity Transit Service on O'ahu from Kapolei to the University of Hawaii at Manoa and Waikiki, City and County of Honolulu, O'ahu, Hawaii, Wait Period Ends: 07/26/2010, Contact: Ted Matley, 415-744-3133.

EIS No. 20100231, Third Draft Supplement, USACE, FL, Herbert Hoover Dike Major Rehabilitation Evaluation Study, Proposed to Reconstruct and Rehabilitate Reach 1A Landside Rehabilitation, Lake Okeechobee, Martin and Palm Beach Counties, FL, Comment Period Ends: 08/09/2010, Contact: Angela Dunn, 904-232-2108.

EIS No. 20100232, Final EIS, NOAA, 00, Amendment 21 to the Pacific Coast Groundfish Fishery Management Plan, (FMP), Allocation of Harvest Opportunity between Sectors, Implementation, WA, OR and CA, Wait Period Ends: 07/26/2010, Contact: Barry A. Thom, 206-526-6150.

EIS No. 20100233, Revised Draft EIS, USFS, 00, Uinta National Forest Oil and Gas Leasing, Implementation, Identify National Forest Systems Lands with Federal Mineral Rights, Wasatch, Utah, Juab, Tooele, and Sanpete Counties, UT, Comment Period Ends: 08/09/2010, Contact: Kim Martin, 801-342-5100.

EIS No. 20100234, Final EIS, USAF, 00, Shaw Air Base Airspace Training Initiative (ATI), 20th Fighter Wing Proposal to Modify the Training Airspace Overlying Parts, South Carolina and Georgia, Wait Period Ends: 07/26/2010, Contact: Linda Devine, 757-964-9434.

EIS No. 20100235, Final EIS, FSA, 00, PROGRAMMATIC--Biomass Crop Assistance Program (BCAP), To Establish and Administer the Program Areas Program Component of BCAP as mandated in Title IX of the 2008 Farm Bill in the United States, Wait Period Ends: 07/26/2010, Contact: Matthew T. Ponish, 202-720-6853. [*36387]

Amended Notices

EIS No. 20040214, Draft EIS, FHWA, CA, WITHDRAWN--Gold Line Phase II--Pasadena to Montclair--Foothill Extension, Address Transportation Problems and Deficiencies, Cities of Pasadena, Arcadia, Monrovia, Durate, Irwindale, Azusa, Glendora, San Dimas, La Verne, Pomona and Claremont in Los Angeles County, and Cities of Montclair and Upland in San Bernardino County, CA, Comment Period Ends: 06/21/2004, Contact: Erv Poka, 213-202-3950. Revision to FR Notice Published 05/07/2004: The EIS was Officially Withdraw by filing Agency in Letter Dated 06/17/2010.

Dated: June 22, 2010.

Robert W. Hargrove,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2010-15502 Filed 6-24-10; 8:45 am]

BILLING CODE 6560-50-P

FEDERAL REGISTER

Vol. 78, No. 110

Notices

ENVIRONMENTAL PROTECTION AGENCY (EPA)

[ER-FRL-9009-5]

Environmental Impacts Statements; Notice of Availability

View PDF of Federal Register Print Version

78 FR 34377

DATE: Friday, June 7, 2013

Responsible Agency: Office of Federal Activities, General Information (202) 564-7146 or *http://www.epa.gov/compliance/nepa/.*

Weekly receipt of Environmental Impact Statements.

Filed 05/28/2013 Through 05/31/2013.

Pursuant to *40 CFR 1506.9.*

Notice

Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EISs are available at: *http://www.epa.gov/compliance/nepa/eisdata.html.*

EIS No. 20130149, Final EIS, FRA, IA, Chicago to Council Bluffs-Omaha Regional Passenger Rail System Planning Study Tier 1, Review Period Ends: 07/08/2013, Contact: Andrea Martin 202-493-6201.

EIS No. 20130150, Final Supplement, FTA, MN, Central Corridor Light Rail Transit Project, Construction-Related Potential Impacts on Business Revenues, Review Period Ends: 07/08/2013, Contact: Maya Sarna (202) 366-5811.

EIS No. 20130151, Final EIS, BR, CA, Klamath Facilities Removal, Review Period Ends: 07/08/2013, Contact: Elizabeth Vasquez 916-978-5040.

EIS No. 20130152, Final EIS, USACE, CA, Sierra Vista Specific Plan (SPK-2006-01050), Review Period Ends: 07/08/2013, Contact: Kathy Norton 916-557-5260.

EIS No. 20130153, Draft EIS, FTA, CA, Downtown San Francisco Ferry Terminal Expansion Project, Comment Period Ends: 07/30/2013, Contact: Mary Nguyen 213-202-3960.

EIS No. 20130154, Final EIS, FTA, WA, Mukilteo Multimodal Project, Review Period Ends: 07/08/2013, Contact: Daniel G. Drais 206-220-7954.

EIS No. 20130155, Draft EIS, USFS, ID, Beaver Creek Project, Comment Period Ends: 07/23/2013, Contact: Lauren Goschke 208-769-3046.

EIS No. 20130156, Draft EIS, BR, NV, Newlands Project Resource Management Plan, Comment Period Ends: 07/29/2013, Contact: Bob Edwards 775-882-7592.

EIS No. 20130157, Draft Supplement, FTA, HI, Honolulu Rail Transit Project (formerly the Honolulu High-Capacity Transit Corridor Project), Comment Period Ends: 07/22/2013, Contact: Mary Nguyen 213-202-3960.

EIS No. 20130158, Final EIS, NPS, TX, Guadalupe Mountains National Park General Management Plan, Review Period Ends: 07/08/2013, Contact: Dennis A. Vasquez 915-828-3151.

EIS No. 20130159, Final Supplement, USACE, IN, Indianapolis North Flood Damage Reduction Project, Review Period Ends: 07/08/2013, Contact: Bonnie Jennings 502-315-6871.

Amended Notices

EIS No. 20130148, Draft Supplement, USACE, FL, Jacksonville Harbor Navigation, Comment Period Ends: 07/15/2013, Contact: Paul Stodola 904-232-3271.

Revision to FR Notice Published 5/31/13; Change Agency Contact Name and Phone Number to Paul Stodola 904-232-3271.

Dated: June 4, 2013.

Aimee S. Hessert,

Deputy Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2013-13597 Filed 6-6-13; 8:45 am]

BILLING CODE 6560-50-P