

November 27, 2017

U.S. Department of Transportation  
Dockets Management Facility  
Room W12-140  
1200 New Jersey Avenue SE  
Washington, DC 20590

Subject: Comments on Supplemental Notice of Proposed Rulemaking for Environmental Impacts and Related Procedures, 23 CFR Parts 771 and 774 (Docket No. FHWA-2015-0011)

To the Federal Highway Administration, Federal Transit Administration, and Federal Railroad Administration:

The American Association of State Highway and Transportation Officials (AASHTO) welcomes the opportunity to submit these comments on the supplemental notice of proposed rulemaking (NPRM) for Environmental Impacts and Related Procedures, 23 CFR Parts 771 and 774. The NPRM was published jointly by the Federal Highway Administration (FHWA), Federal Transit Administration (FTA), and Federal Railroad Administration (FRA) on September 29, 2017. (82 Fed. Reg. 45530).

AASHTO is a nonprofit, nonpartisan association representing the State transportation departments in the 50 states, the District of Columbia, and Puerto Rico. It represents all five transportation modes: air, highways, public transportation, rail, and water. Its primary goal is to foster the development, operation, and maintenance of an integrated national transportation system. Our members work closely with USDOT agencies to operate, maintain, and improve the nation's transportation system.

With this NPRM, the FHWA, FTA and FRA ("Agencies") propose a series of updates to the regulations implementing the National Environmental Policy Act ("NEPA") and Section 4(f) of the U.S. Department of Transportation Act in 23 C.F.R. Parts 771 and 774, respectively. Many of the proposed changes implement changes made in the Moving Ahead for Progress in the 21st Century Act ("MAP-21") and the Fixing America's Surface Transportation ("FAST Act"). The proposed changes also would, for the first time, apply Parts 771 and 774 to the FRA's program.

AASHTO applauds the Agencies' ongoing efforts to improve efficiency of the NEPA process. We generally support the proposed updates to Parts 771 and 774, but recommend several changes to clarify the regulations, provide greater flexibility, or ensure consistency with the statute. We also provide comments in response to several issues on which the Agencies have requested input in the NPRM, including definition of "existing operational right of way."

## **1. Applicability of Parts 771 and 774 to FRA Actions.**

We support the proposal to apply Parts 771 and 774 to the FRA's program. It is desirable from an efficiency standpoint for FHWA, FTA, and FRA to follow a single common set of environmental regulations, tailored to reflect distinct aspects of each agency's program. Applying Part 771 to FRA projects will be especially helpful for multimodal projects that require preparation of a single NEPA document to support decisions by FRA and FHWA and/or FTA. We also support the proposed incorporation of FRA's CE list into Part 771 and the expansion of the FRA's CEs so that it more closely mirrors the FHWA and FTA lists. For example, the proposed rule would expand the FRA CE list to include activities such as geotechnical investigations and property acquisition, which are currently included in the FHWA and FTA lists. Creating greater consistency among FHWA, FTA, and FRA CE lists will help streamline environmental reviews for projects that require approval from two or more of the Agencies. On a related note, outside this rulemaking, we urge the Agencies (individually, or through the U.S. Department of Transportation) to issue guidance affirming –whether under 49 U.S.C. 304 or other authority – that each modal agency of the Department may use CEs issued by other modal agencies. The circumstances that support issuance of a CE do not depend on which agency is issuing the CE. If one agency has determined that a CE is appropriate for a type of activity or project, another agency within the Department should be able to rely upon that same CE.

## **2. Implementing MAP-21 and FAST Act Amendments to 23 USC 139.**

We support the proposal to update Part 771 to implement numerous changes made by MAP-21 and the FAST Act to 23 U.S.C. 139 (“section 139”).<sup>1</sup> The amendments to Section 139 were relatively detailed, and to a large extent the proposed rule simply implements those changes. Overall, we found the proposed changes to be consistent with the statute. We have commented on a few specific areas as noted below.

***Coordination Plan and Schedule.*** The proposed rule acknowledges that, under the FAST Act, participating agencies are responsible for providing concurrence in the project schedule, and the lead agencies are responsible for establishing that schedule (as part of a coordination plan) within 90 days after the Notice of Intent is issued for an EIS. While the language in the proposed rule is consistent with the statute, it leaves unanswered the important question of how the lead agencies satisfy their responsibilities under section 139 if one or more participating agencies refuse to concur in the schedule within the 90-day period. We recommend clarifying in the final rule that, if the participating agencies refuse to concur or do not respond, the environmental process can move forward while the lead agencies seek resolution of any outstanding issues involving the project schedule.

***Participating Agencies' Comments.*** The NPRM acknowledges that section 139, as amended by the FAST Act, directs participating agencies to provide input “on those areas within the special expertise or jurisdiction of the agency” but then goes on to say that the NPRM does not include that language in the proposed rule itself because doing so would be “unnecessarily limiting and could lead a project sponsor to believe an unlisted method of providing input is not permitted.” (82 Fed. Reg. 45533). We disagree with this approach. The clear intent of the amendments to section 139 in the FAST Act was, indeed, to direct, or at least encourage, participating agencies

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<sup>1</sup> Section 139 establishes an environmental review process that is mandatory for all FHWA, FTA, and FRA projects for which an environmental impact statement is prepared.

to focus their comments on areas within their expertise. We strongly recommend including that language, in some form, in the actual text of the final rule.

***Eliminating Alternatives Considered in Planning.*** The NPRM acknowledges that section 139, as amended by the FAST Act, provides an additional statutory basis for eliminating alternatives considered in the metropolitan planning process, in addition to the authority already provided under 23 USC 168 and the transportation planning regulations. (82 Fed. Reg. 45533). The NPRM also points out that this authority applies to FRA, whereas 23 USC 168 and the transportation planning regulations apply only to FHWA and FTA. We agree with the characterization of this new statutory authority for adopting planning-level decisions in the NEPA process. We also agree with the text of the proposed rule in section 771.111(a)(2)(i), which provides flexibility by stating that any of these authorities can be used, where applicable, to adopt transportation planning products for use in the NEPA process.

### **3. Implementing New Section 4(f) Exceptions in 23 CFR 774.13(a)**

We generally support the proposed amendments to 23 CFR 774.13, which are intended to implement two Section 4(f) exemptions mandated in the FAST Act: (1) an exemption for certain post-1945 steel and concrete bridges, and (2) an exemption for certain historic railroad and rail transit lines, excluding “stations” and certain bridges and tunnels on those lines. We have a few minor comments on these proposals as noted below.

#### ***771.13(a)(1) – Post-1945 Bridges***

The Section 4(f) exemption for certain post-1945 steel and concrete bridges applies to such bridges if they are covered by the Advisory Council on Historic Preservation’s Section 106 program comments for those bridges. The intent of the FAST Act was to create a Section 4(f) exemption that is identical in scope to the Section 106 program comments. The language in the proposed rule appropriately reflects this statutory objective; therefore, we support the proposal.

#### ***774.13(a)(2) – Historic Railroad and Rail Transit Facilities***

The proposed rule provides useful clarification of the Section 4(f) exemption for improvements to historic railroad and rail transit facilities by clarifying the term “improvements” and the term “railroad or rail transit lines or elements thereof.” We have a few comments on these provisions as noted below.

First, the term “improvements” is defined in the text of the proposed rule as “including, but not limited to, maintenance, preservation, rehabilitation, operation, modernization, reconstruction, and replacement.” This broad, inclusive language is appropriate and consistent with the intent to provide a Section 4(f) exemption for construction involving existing railroad facilities.

Second, the term “railroad or rail transit lines or elements thereof” is not defined in the text of the rule itself, but the NPRM explains that the Agencies “view these terms as including all elements related to the historic or current transportation function such as railroad or rail transit track, elevated support structures, rights-of-way, substations, communication devices, and maintenance facilities.” (82 Fed. Reg. 45539). We support this broad interpretation. However, to ensure it is not overlooked, we suggest that the Agencies include this clarification in the text of the rule itself.

We also note that it may be beneficial to clarify the term “stations” as it is used in this exemption. Under the statute, all “stations” are excluded from the exemption, meaning that the stations remain subject to Section 4(f). Neither the statute nor the proposed rule defines what “stations” include. We recommend that the term “stations” be defined to include the station building, and not the associated tracks, yards, electrification and communication infrastructure, or other ancillary facilities.

Finally, we note that the proposed section 771.13(a)(2)(ii) excludes “(ii) Bridges or tunnels on railroad lines that have been abandoned or transit lines not in use over which regular service has never operated, *and* that have not been railbanked or otherwise reserved for the transportation of goods or passengers.” The statute uses the term “or” rather than “and” in this context – implying that the facility is excluded if *either* condition is met, whereas the proposed text implies that both conditions need to be met in order for the facility to be excluded. We recommend reconsidering and possibly revising this provision to ensure it is consistent with the statute.

#### ***774.13(a)(3) – Exception for Historic Transportation Facilities.***

The proposed rule would retain the existing general exemption for projects involving the “restoration, rehabilitation, or maintenance” of historic transportation facilities, if two conditions are met: (1) the Section 106 process results in a finding of “no adverse effect” and (2) the “official(s) with jurisdiction” over that historic resource “have not objected” to that conclusion.

The NPRM seeks comment on whether the list of activities in this exemption (“restoration, rehabilitation, or maintenance”) should be expanded to mirror the activities included in 771.13(a)(2) – namely, “maintenance, preservation, rehabilitation, operation, modernization, reconstruction, and replacement.” We support making this change, because it would provide greater consistency in the application of the exemption to different types of historic transportation facilities and because using consistent language helps to avoid confusion.

The NPRM also seeks comment on whether the two conditions specified in this exemption would “adequately protect significant historic transportation facilities in the case of projects to operate, modernize, reconstruct or replace the transportation facility.” We support retention of the two existing conditions. For historic properties, the State Historic Preservation Officer is always an “official with jurisdiction” for purposes of Section 4(f). Requiring SHPO concurrence in a “no adverse effect” finding provides substantial assurance that the project would not destroy or otherwise seriously harm historic transportation facilities.

#### **4. Statute of Limitations**

We support the proposal to amend Part 771 to reflect the 2-year statute of limitations applicable to railroad projects approved by the FRA, but we recommend revising the wording of the rule to clarify the distinction between projects subject to the 150-day limitations period and projects subject to the 2-year limitations period, as explained below.

Prior to the FAST Act, FHWA and FTA were authorized in 23 U.S.C. 139(l) to issue limitations of claims notices for all federal approvals issued for a “highway or public transportation capital project.” In the FAST Act, Congress enacted 49 U.S.C. 24201, which provided in part that section 139(l) “shall apply to railroad projects described in paragraph (1), except that the

limitation on claims of 150 days shall be 2 years.” In effect, this meant that FRA-approved railroad projects are subject to a 2-year statute of limitations, while FHWA-approved highway projects and FTA-approved transit projects are subject to a 150-day statute of limitations.

Importantly, the statute of limitations established in section 139(l) – either 150 days or 2 years – applies to *all federal agency actions* for the highway, transit, or railroad project. In other words, the 150-day period does not simply apply to FHWA’s approval of a highway project; it applies to all approvals by any federal agency for that highway project. This distinction is not made clearly in the proposed rule, which states that:

Claims arising under Federal law seeking judicial review of any such ***decisions by FHWA or FTA*** are time barred unless filed within 150 days after the date of publication of the limitations on claims notice. Claims arising under Federal law seeking judicial review of ***any such decisions by FRA*** are time barred unless filed within 2 years after the date of publication of the limitations on claims notice

(82 Fed. Reg. 45546). This language omits any reference to other federal agencies whose decisions also would be subject to the 150-day period or 2-year period, as applicable. To ensure that the regulation is clear, we recommend revising this language as follows:

Claims arising under Federal law seeking judicial review of any such ***decisions for a highway or transit project approved*** are time barred unless filed within 150 days after the date of publication of the limitations on claims notice. Claims arising under Federal law seeking judicial review of ***any such decisions for a railroad project*** are time barred unless filed within 2 years after the date of publication of the limitations on claims notice

If necessary to avoid confusion, the terms “highway project,” “transit project,” and “railroad project” could be defined in 23 U.S.C. 107 (the Definitions section of Part 771).

##### **5. CE for Projects in “Existing Operational Right-of-Way”**

The NPRM requests comments regarding the definition of “existing operational right-of-way” for the CEs located at 23 CFR 771.117(c)(22) and 771.118(c)(12), respectively. More specifically, the NPRM explains that the Agencies are “soliciting feedback from the public on how operational right-of-way is currently defined in the regulation and request detailed proposals on ways to further clarify the existing definition.”

These CEs were established pursuant Section 1316 of MAP-21, which directed FHWA and FTA to establish a new CE applicable to projects within the “existing operational right-of-way.” The statute defined the “operational right-of-way” to mean “all real property interests acquired for the construction, operation, or mitigation of a project ... including the locations of the roadway, bridges, interchanges, culverts, drainage, clear zone, traffic control signage, landscaping, and any rest areas with direct access to a controlled access highway.”

In the final rule issued on January 13, 2014, the FHWA and FTA adopted a narrower definition of “existing operational right-of-way” than the definition provided in statute. The regulations

defined this term to mean “right-of-way that has been disturbed for an existing transportation facility or is maintained for a transportation purpose.” This definition introduced the need to determine whether an area that has been acquired for a transportation project has been “previously disturbed” and/or is being “maintained for a transportation purpose.”

The January 13, 2014 final rule provided some clarification of those terms, but in doing so it confirmed that these terms have the potential to restrict the use of this CE beyond what Congress intended:

- The final rule interpreted “disturbed” to mean that “a transportation facility must already exist at the time of the review of the proposed project being considered for the CE” and stated that “Evidence that the area was disturbed for a transportation facility should be provided (such as photographs, visual inspection)...”. This interpretation implies that in the absence of photographic or other historical evidence of prior physical disturbance, an area within the State-owned highway right-of-way would not qualify for the CE.
- The final rule interpreted “maintained for a transportation purpose” to exclude “areas outside those areas necessary for existing transportation facilities, such as uneconomic remnants or excess right-of-way that is secured by a fence to prevent trespassing, or that are acquired and held for a future transportation project.” It also stated that “A transportation facility that has fallen in disuse may require an assessment to determine if it is still being maintained for a transportation purpose.”

As these explanations make clear, the use of this CE may be precluded if the State cannot establish that the right-of-way was “previously disturbed” or if the State cannot show that the right-of-way is not currently necessary for the functioning of the existing transportation facility. Whatever the policy justifications for those restrictions may be, they have no basis in the statute itself. Under the statute, the CE must be available for “all real property interests *acquired for* the construction, operation, or mitigation of a project”.

In practice, the addition of the terms “previously disturbed” and “maintained for” have restricted the availability of this CE. These restrictions are inconsistent with the plain language of the statute, and are contrary to Congressional intent.

We recommend that FHWA and FTA revise the definition of “existing operational right-of-way” at 23 CFR 771.117(c)(22) and 771.118(c)(12) to conform to the definition provided in Section 1316 of MAP-21. This could be done by making the following changes:

Projects, as defined in 23 U.S.C. 101, that would take place entirely within the existing operational right-of-way. Existing operational right-of-way refers to right-of-way that was acquired for construction, operation, or mitigation of an existing transportation facility. This area includes the features associated with the physical footprint of the transportation facility (including the roadway, bridges, interchanges, culverts, drainage, fixed guideways, mitigation areas, etc.) and other areas such as clear zone, traffic control signage, landscaping, any rest areas with direct access to a controlled access highway, areas maintained for safety and security of a transportation facility, parking facilities with

direct access to an existing transportation facility, transit power substations, transit venting structures, and transit maintenance facilities.

## **5. Timing of Project Activities**

Section 771.113 lists a series of activities that are precluded prior to completion of NEPA, as well as a list of exceptions to that prohibition. The NPRM proposes an additional exception, under which FRA could make “case-by-case exceptions for the purchase of railroad components or materials that can be used in other projects or resold.” The NPRM explains that FRA would make these determinations “based on the information available at the time to ensure such activities would not improperly influence the outcome of the NEPA process.” We recommend adding a similar exception allowing FHWA and FTA to make case-by-case determinations allowing activities (including purchases) that would not improperly influence the outcome of the NEPA process, such as the acquisition of long-lead time construction materials or equipment.

Thank you for the opportunity to submit comments. If you would like additional input, please contact Shannon Eggleston at (202) 624-3649 or [seggleston@aaashto.org](mailto:seggleston@aaashto.org).

Sincerely,

A handwritten signature in black ink, appearing to read 'John Schroer', with a long horizontal flourish extending to the right.

John Schroer  
President, American Association of State Highway and Transportation Officials  
Commissioner, Tennessee Department of Transportation